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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
OWENS-ILLINOIS GLASS COMPANY,
HAZEL-ATLAS GLASS COMPANY,
CORNING GLASS WORKS,
THATCHER MANUFACTURING COMPANY,
GLASS CONTAINER ASSOCIATION OF AMERICA, INC.,
THE STEVENSON CORPORATION,
Respondents.

No. ~~831~~ 92

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit,

BRIEF IN SUPPORT THEREOF, OPINION OF COURT OF APPEALS, AND MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

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PREFATORY NOTE.

The following abbreviations are used by Petitioner:

Corning—Corning Glass Works.

Hartford—Hartford-Empire Company.

Hazel—Hazel-Atlas Glass Company.

Owens—Owens Illinois Glass Company.

P. X.—Petitioner's Exhibit.

Stevenson—Stevenson Corporation.

Thatcher—Thatcher Manufacturing Company.

Toledo Case—United States v. Hartford-Empire Co. et al., 46 F. Supp. 541, 323 U. S. 386, 324 U. S. 570.

Toledo Court—The United States District Court for the Northern District of Ohio, Western Division, trial court of Toledo case.

Turner—Turner Glass Corporation.

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TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Supreme Court of the United States:

Turner Glass Corporation, an Indiana corporation, respectfully petitioning shows the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action under the Anti-trust laws of the United States, to recover treble damages, commenced by Petitioner against Respondents, each of which, except The

Stevenson Corporation, was adjudged to have violated Sections 1 and 2 of the Sherman Act in that they conspired, combined, monopolized and attempted to monopolize and restrain trade and commerce in the glass container industry (15 U. S. C. A. 1 and 2). Hartford-Empire was adjudged to have also violated Section 3 of the Clayton Act. **United States v. Hartford-Empire Co. et al.**, 46 F. Supp. 541; **Hartford-Empire Company et al. v. United States**, 323 U. S. 386, 324 U. S. 570.

Petitioner's glass container manufacturing properties of the appraised value of $1,828,882 (R. 437) were acquired for a nominal sum by one Mandeville, a nominee of a corporation formed by respondents Hartford Empire Co., Thatcher, and Hocking Glass Company (R. 823-824) (subsequently Anchor Hocking Glass Company, not a party here) after Petitioner was placed in receivership upon complaint of respondent Hartford for unpaid license fees and royalties. From 1924 until approximately the time of the receivership, and while the conspiracy, combination and monopoly were in full existence, petitioner paid to Hartford $1,023,828.32 as royalties and license fees which were secretly divided with respondent Owens Illinois Glass, a competitor of petitioner. Petitioner did not learn of the conspiracy, monopoly and combination nor of the secret and preferential division of fees with one of its competitors until the commencement of the government action in **U. S. v. Hartford-Empire Company et al.**, 46 F. Supp. 541 (hereafter referred to as Toledo Case or Toledo Judgment).

Respondents in their answers denied that they had conspired, monopolized or combined or had violated either the Sherman or Clayton Acts. Other defenses were also asserted but are not now material here.

A hearing was had before a Special Master appointed over objection of petitioner. The record consisted of 13,000 pages of testimony and stipulations and 1221 exhibits received in evidence. At the conclusion of petitioner's case the respondents moved to dismiss, then subsequently rested without going forward.

The Special Master made findings and concluded that the law was with the respondents and that petitioner's complaint as amended and supplemented be dismissed (R. 568). Exceptions to the report were filed by petitioner, overruled by the Court, and the findings and conclusions of the Special Master were confirmed without modification.

Judgment was entered for respondents (R. 665).

Petitioner appealed within time to the Circuit Court of Appeals for the Seventh Circuit. Petitioner's properties having been acquired in 1931, by reason of the receivership on the complaint of respondent Hartford, petitioner was without funds to comply with Rule 14 of the said Circuit Court of Appeals which requires that records on appeal be printed. A timely petition was filed with said Court requesting that the said printing rule be waived (R. 2035). The petition was denied (R. 2093). Petitioner then petitioned for permission to present only three questions on a much reduced but unprinted record (R. 2098). This petition was granted (R. 2143).

The Circuit Court of Appeals affirmed the District Court (R. 2155-2162) and held:

> (1) Contrary to the findings and conclusions of the Toledo Court (R. 670) affirmed by this Court (323 U. S. 386), that the license and lease agreements of respondent Hartford, licensing and leasing glass container manufacturing machinery "did not involve the doing

of anything illegal . . ." and "that the licensing agreements were not inherently illegal" (R. 2162).

(2) That the final judgment of the Toledo Court, admitted in evidence here (15 U. S. C. A. 16) was not prima facie evidence of the fact of injury to petitioner's glass container manufacturing business and property by respondents here who were adjudged in the Toledo case to have violated the Anti-trust laws of the United States in a nationwide conspiracy, monopoly and combination in restraint of trade, affecting the entire glass container manufacturing industry, all of which existed while petitioner was engaged in interstate commerce and in manufacturing glass containers, on machinery licensed to it by respondent, Hartford, under illegal license agreements held to be such in **U. S. v. Hartford-Empire Co. et al.**, 46 F. Supp. 541; **Hartford-Empire v. U. S.**, 323 U. S. 386, 324 U. S. 570.

(3) That petitioner "has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants (respondents) may have done" (R. 2159), when:

(i) The Toledo Court found, and was affirmed by this Court, that in July, 1930 (which was less than six months before Hartford petitioned for a receiver for petitioner), Mandeville (nominee of buyer of petitioner's properties and officer of respondent Thatcher), together with one Griffis, on Griffis' yacht, offered Hartley, President of petitioner "20,000 shares of Thatcher stock to 'send the Turner Glass Company through the wringer' . . ." (R. 824).

(ii) It is stipulated that on December 27, 1930, a receiver was appointed for petitioner upon the

complaint of Hartford based on unpaid license fees and royalties (R. 1039).

(iii) General Glass Corporation, formed by respondents Hartford and Thatcher and Hocking Glass Company, not a party, acquired through its nominee, Mandeville, petitioner's tangible property (R. 823-824) including two glass container manufacturing plants, appraised at $1,828,882 (R. 437), substantial personal property and all of the outstanding common stock of Monongah Glass Company of Fairmont, West Virginia, for $6000 (R. 1110), subject to the lien of a mortgage securing $750,000 of long term bonds, the assumption of taxes in the amount of $24,950 and a five year guarantee of interest on the bonds (R. 1039-1040).

(iv) Petitioner was forced to do business in the face of what Judge Kloeb characterized as a violation of the Anti-trust laws as "deliberate as any that I can find in a review of Anti-trust cases" (46 F. Supp. 541, 553), and by reason of the conspiracy, monopoly and combination petitioner was forced to and did pay respondent Hartford $1,023,828.32 in royalties and license fees from 1924 to 1930 (R. 1033-1036), the year of the receivership, which were secretly shared by Hartford with respondent Owens, a competitor of petitioner (R. 380), and which were paid under and pursuant to licenses and leases which Judge Kloeb concluded as a matter of law were in violation of Sections 1 and 2 of the Sherman Act (R. 840-841; 852-853).

(v) There was an uncontradicted showing by petitioner that after the receivership sale one or more of the respondents had acquired all of petitioner's tangible properties, some of its customers, and some of its key personnel.

Without more such a showing incontrovertibly established pecuniary damage to petitioner's business and property caused by respondents.

Petitioner also presented to the Circuit Court of Appeals the question of the legal propriety of the use by the Special Master in his findings and report, of matter not in the record in the instant case. This matter consisted of certain proposed findings tendered to the Toledo Court by Government counsel in the Toledo case, where petitioner was not a party, and which proposed findings were not adopted by the Toledo trial court. These proposed findings were neither offered nor admitted in evidence in the instant case but were handed to the Special Master by counsel for some of respondents and are set out in full in the report of, and petitioner contends were relied on by, the Special Master. Objections by petitioner to the Master's report asserting the use of matter dehors the record were overruled.

This question was presented to but not passed on by the Circuit Court of Appeals.

II.

STATEMENT DISCLOSING JURISDICTIONAL BASIS.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, Section 39, 62 Stat. 992, effective September 1, 1948 (28 U. S. C. A. 1254). This petition for certiorari was filed before the expiration of ninety days from March 7, 1949, the date of the decision of the Circuit Court of Appeals (R. 2164).

III.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, four important federal questions are involved:

(1) Whether on the undisputed facts petitioner is entitled to recover as damages under the Anti-trust laws, license fees and royalties paid to respondent Hartford and secretly shared by Hartford with respondent Owens, a competitor of petitioner, for use of glass container manufacturing machinery, which payments were made under license and lease agreements adjudged to be illegal, and which payments were made when respondents were engaged in a nationwide conspiracy, combination and monopoly in restraint of trade in the glass container manufacturing field and particularly in a glass container machinery patent monopoly and combination.

(2) Whether under Section 5 of the Clayton Act (15 U. S. C. A. 16) the final judgment against respondents, except Stevenson, admitted in evidence here, adjudging violations of the Anti-trust laws in a nationwide conspiracy, monopoly and combination in restraint of trade and affecting the entire glass container manufacturing industry (and particularly as the judgment is supported by the Toledo findings and conclusions also in evidence here), established the fact of injury to petitioner's glass container manufacturing business and property as a licensee of respondent Hartford under license and lease agreements held to be illegal in the Toledo case.

(3) Whether petitioner can recover damages for injury to its glass container manufacturing business and property based on the following:

(a) Respondents, except Stevenson, were adjudged to have violated the Anti-Trust laws of the United States in a nationwide conspiracy, monopoly and combination in restraint of trade of and affecting the glass container manufacturing industry.

(b) Petitioner at all relevant times paid license fees and royalties to respondent Hartford which Hartford secretly shared with respondent Owens, a competitor of petitioner.

(c) The license and lease agreements under which petitioner paid royalties and license fees to respondent Hartford were adjudged to be inherently illegal and to have been used for an illegal purpose.

(d) Petitioner was placed in receivership upon complaint of respondent Hartford brought for unpaid license fees and royalties claimed due under the illegal license and lease agreements and its tangible property taken over by some of respondents and its business destroyed.

(e) When the receivership was closed all of petitioner's tangible properties and some of its key personnel were in the hands of one or more of respondents.

(4) Whether the Special Master and the Trial Court denied petitioner due process of law in considering and relying upon certain proposed findings of fact submitted by Government counsel to the Toledo Court, where petitioner was not a party, which were not adopted by the Toledo Court, and which were never offered or admitted in evidence and are no part of the record in the instant case, but which are set out

in the report of the Special Master as an ultimate conclusion of fact, which report was confirmed without modification by the Trial Court.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(1) The Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court in this, to wit: It decided that the licensing agreements of respondent Hartford relating to glass making machinery were not inherently illegal nor did they involve the doing of anything illegal (R. 2162). The Toledo Court concluded as a matter of law that the license agreements violated sections 1 and 2 of the Sherman Act (Ohio Conclusions 32, 33, R. 840; 34, R. 841; 82, R. 852; 83, 84, R. 853). The findings and conclusions of the Toledo Court were confirmed by this Court (323 U. S. 386, 400, 406).

(2) The Circuit Court of Appeals for the Seventh Circuit in holding that petitioner has no right to recover license fees and royalties paid to respondent Hartford during the existence of a nationwide conspiracy, combination and monopoly in which respondents were engaged in restraint of trade in the glass container industry, has decided a Federal question under Section 15 of the Antitrust laws in conflict with applicable principles announced in decisions of the Supreme Court. It has been adjudicated that petitioner would have had a defense against a suit to recover royalties brought by respondents who were found to have violated the Sherman or Clayton Acts. **Continental Wall Paper Co. v. Louis Voight & Son**, 212 U. S. 227; **Bruce's Juices v. American Can Co.**, 330 U. S. 743. How-

ever, having made the payments wrongfully induced, which were an injury and damage to petitioner's business and property, **Chattanooga Foundry & Pipe Works et al. v. City of Atlanta,** 203 U. S. 390, petitioner's right to recover, given and measured by statute, has been denied contrary to principles announced by this Court.

This is a question of general importance and substance relating to the construction of the Anti-trust laws of the United States and decisions of this Court, and if it is reannunciated that such payments are recoverable as damages in civil actions it will be a substantial deterrent to future violations and of great aid to government authority in the enforcement of the Anti-trust laws.

(3) The construction of Section 5 of the Clayton Act is a question which has not been but should be settled by this Court. The respondents, except Stevenson, were adjudged by the Toledo Court to have violated the Anti-trust laws of the United States in a nationwide conspiracy, monopoly and combination to restrain, and in the restraint of, trade in the entire glass container manufacturing industry in which petitioner was engaged during the time the conspiracy, monopoly and combination were in existence and until petitioner's tangible property and business were sold in a receivership proceedings commenced by respondent Hartford for unpaid license fees and royalties.

The final judgment, findings and conclusions of the Toledo Court were admitted in evidence, the respondents at the conclusion of petitioner's case moved to dismiss, then rested without going forward. Under the circumstances of the instant case the admission in evidence of the said final judgment, findings and conclusions, without regard to petitioner's other evidence, established prima facie the fact of injury through the illegal conspiracy, combination, monopoly and restraint in the glass container

industry, to petitioner's glass container property and business which became conclusive when respondents rested without going forward to rebut such prima facie showing.

(4) The Special Master relied upon and set out in his report, which was affirmed by the District Court, proposed findings of government counsel in the Toledo case, where petitioner was not a party, and which were not adopted by the Toledo Court nor were such proposed findings offered or introduced in evidence in the instant case. Any reliance upon such matter not in this record is a denial to petitioner of the minimal requirements of due process and is in conflict with the decision of this Court in **Ohio Bell Telephone Company v. Public Utilities Commission**, 301 U. S. 292, 305, and comparable cases.

It was contended by the respondents that the so-called rejection by the Toledo Court, of the proposed findings and the findings themselves, even though they were no part of this record, could be properly considered to limit the effect of the Toledo decree under section 5 of the Clayton Act.

This contention is tantamount to asserting that petitioner's action for damages here was decided in the Toledo case, which was an injunctive proceeding brought by the United States and to which petitioner was not a party. Obviously, petitioner had no notice and hearing in the Toledo case as is guaranteed by the Fifth Amendment.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of the Honorable Court directed to the United States Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and all proceed-

ings in the case numbered and entitled on the docket of said United States Court of Appeals, No. 9633, and entitled "Turner Glass Corporation, Plaintiff, v. Hartford-Empire Co. et al., Defendants," and that the decree of the United States Court of Appeals for the Seventh Circuit in said cause be reversed by this Court and that petitioner have such other and further relief in the premises as this Court may deem just.

Respectfully submitted,

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IN THE

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TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The case was heard before a Special Master who filed a report (R. 372-568). The District Court overruled petitioner's objections to the report, but neither gave nor filed an opinion. The facts were found specially (R. 570-663) and conclusions of law stated (R. 664).

The opinion of the Circuit Court of Appeals filed on March 7, 1949, appears at pages 2155 to and including 2162 of the record and is reported in 173 F. (2d) 49, and is printed as Appendix A hereto.

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is asserted this Court has jurisdiction is set out on page 6, infra.

III.

STATEMENT OF THE CASE.

On December 27, 1930, respondent Hartford filed a complaint praying a receiver be appointed for petitioner based on a claim for unpaid license fees and royalties for the use of glass container manufacturing machinery which included feeders, formers, stackers and lehrs (R. 1077-1081). A receiver was appointed by the Federal District Court for the Southern District of Indiana. Upon the receiver's petition the tangible property of petitioner was ordered sold. The receiver's sale was fixed for March 20, 1931. On that day the receiver sold "certain capital stock of Fall Creek Corporation and certain other interests of" petitioner against the Fall Creek Corporation "but received no bid for the other property belonging to" petitioner (R. 1109). The sale was adjourned to April 3, 1931.

On April 3, 1931, the following property of petitioner was offered for sale and sold:

> (a) Two glass container manufacturing plants of petitioner, one at Terre Haute, the other at Winchester, Indiana. The combined properties had been ap-

praised by independent appraisers on a sound value basis after depreciation at $1,828,882.45 (R. 437).

(b) All the personal property of petitioner in the custody of the receiver consisting of machinery, molds, jigs, tools and dies, patents and patent rights, trade marks, licenses, interest in property installed under contracts of lease and/or conditional sale.

(c) The common stock of Monongah Glass Company and of Turner Glass Sales Corporation.

All of the property of petitioner above listed was sold subject to the lien of a certain mortgage securing a bond issue of petitioner, to the sole and only bidder therefor, one Mandeville, for the sum of $6000.00. The purchaser assumed the payment of taxes in the amount of $24,950 and agreed to guarantee interest on the outstanding bonds for a period of five years (R. 1039-1040).

Mandeville was the nominee of General Glass Corporation, a corporation formed in February, 1931, a little more than one month before the said receiver's sale, pursuant to an agreement among respondents Hartford and Thatcher and Hocking Glass Company, not a party here (R. 823-824).

Thus, General Glass Corporation acquired all the physical assets and tangible property of petitioner, and in addition thereto, one or more of the respondents employed some of the key personnel of petitioner (R. 1040, 997-1002). In 1935, approximately five years after General acquired petitioner's property, respondent Thatcher sold its one-half interest in General to the Hocking Glass Company for a profit of $505,000 (R. 1040-1041). General had never operated the Terre Haute plant of petitioner. Thus the profit was made on only the Winchester, Indiana, plant.

Each of the respondents, except Stevenson, was adjudged to have violated the Anti-trust laws of the United

States in the case of **U. S. v. Hartford-Empire**, 46 F. Supp. 541, 323 U. S. 386, 324 U. S. 570. It was not until the commencement of this Government suit that petitioner learned of the conspiracy, monopoly and combination in restraint of trade.

From 1893 to December 27, 1930, the date of the appointment of the receiver, petitioner was engaged in the manufacture and sale of glass containers in interstate commerce. At the date of the receivership it owned a glass container manufacturing plant at Winchester and one at Terre Haute, Indiana, and also owned all of the outstanding common stock of Monongah Glass Company, which also owned a glass container manufacturing plant.

In its early days plaintiff's glassware was made principally by hand. By 1916 there were two commercial methods of manufacturing glass containers which were known as the suction and gob feed processes. By 1922 petitioner was a licensee of the Howard Automatic Glass Machinery Company, which was then licensing feeders in competition with respondent Hartford. At that time there were 43 Howard feeders in the hands of 13 Howard licensees, one of which was petitioner. Hartford had only 16 feeder licensees (R. 692).

Hartford believed that the Howard patent applications dominated certain essential features of its own feeding device and sought to eliminate Howard from competition and thus eliminate a gob feeder which might be used in competition with respondent Corning and also might be used by small producers to continue in business and quote "prices which would be detrimental to the general trade" (R. 692, 693). On June 23, 1922, Hartford acquired the Howard Company through a devious arrangement with Beechnut Packing Company and Hartford Special Ma-

chinery Company (R. 693). The acquisition of the Howard Company by Hartford was held by the Toledo Court to have violated Section 2 of the Sherman Act (R. 846). (See also 46 F. Supp. 541, 557.)

By reason of Hartford's acquisition of the Howard patents and feeders petitioner became a Hartford licensee and continued as such until the receivership on December 27, 1930. In view of all circumstances it can hardly be contended that petitioner voluntarily became a Hartford licensee. Petitioner and its subsidiary, Monongah Glass Company, were licensees under 112 license and lease agreements. Petitioner paid to Hartford as license fees and royalties from 1924 until approximately the middle of 1930, $1,023,828.32 (R. 1033, 1036). On December 27, 1930, Hartford filed a complaint for receiver for petitioner based on unpaid royalties and license fees in the aggregate of $79,926.62 (R. 1038). After the receivership sale which disposed of all of petitioner's tangible property, as hereinbefore set out, petitioner never again engaged in business.

In 1938 the Temporary National Economic Committee of Congress investigated the concentration of economic power (Sen. Doc. No. 95, 76th Cong., 1st Sess. 1939). As a result of this the Government commenced an action on December 11, 1939, in the District Court for the Northern District of Ohio at Toledo against 12 corporate defendants and 101 individual defendants. (Hereinbefore and hereinafter referred to as the Toledo case.) All respondents here were defendants in the Government action but prior to trial the Government dismissed as to the Stevenson Corporation.

The gravamen of the case was that the defendants there had cooperated in obtaining and licensing patents cover-

ing glass making machinery, including that used in manufacturing glass containers, and limited and restricted the use of the patented machinery by a network of agreements and had maintained prices for unpatented glassware (323 U. S. 386 at 392). Each of the respondents here except The Stevenson Corporation was found to have violated Sections 1 and 2 of the Sherman Act and, in the case of respondent Hartford, Section 3 of the Clayton Act.

The Trial Court made 628 findings of fact and stated thereon 89 conclusions of law (R. 670-855). This court affirmed the Trial Court's findings in all matters pertinent here (Hartford-Empire Co. et al. v. U. S., 323 U. S. 386).

It was adjudged that the respondents, except Stevenson, illegally aggregated patents to dominate and control the entire glass container manufacturing industry through restrictive license agreements. At least one of the patents, viz., 1,655,391, under which petitioner was licensed (R. 1563) was procured by respondent Hartford through fraud. **Hazel-Atlas Glass Company v. Hartford-Empire Co.**, 322 U. S. 238; **Shawkee Mfg. Co. v. Hartford-Empire Co.**, 322 U. S. 271.

The Toledo Court in its conclusions of law held that the license and lease agreements violated Sections 1 and 2 of the Sherman Act (Ohio Concls. 31, 32 and 33, R. 840; 34, R. 841; 82, R. 852; 83, 84, R. 853).

Petitioner's license and lease agreements for feeder machines each contained the restrictions and limitations condemned by the Toledo Court in its Conclusions of Law and affirmed by this Court as being violative of the Sherman Act (R. 1362, 1390, 1538, 1564, 1592, 1762, 1791, 1818, 1845, 1883, 1915, 1970). It was under such license and lease agreements that petitioner paid to respondent Hartford over $1,000,000 in royalties and license fees.

The license fees and royalties paid by petitioner to Hartford under these agreements were secretly shared by Hartford with respondent Owens, a competitor of petitioner, for the precise purpose of keeping petitioner (and others) at a competitive disadvantage. Respondent Hartford also gave Owens the right to use 40 feeder and forming machines free of royalty and license fees, which also placed respondent Owens in a dominant competitive position in the glass container industry. The purposes of the arrangements by respondent Hartford were many, but among them were the stabilization of the price of unpatented glassware and the restriction of the production thereof, and to effect a monopoly of all patents relating to glass making machinery and the issuance of licenses thereunder, and to avoid competition in the manufacture of glassware by the adoption of a restricted licensing policy by respondent Hartford (R. 701, 702).

Petitioner under its license and lease agreements from respondent Hartford was at all times prohibited from engaging in the manufacture of so-called heat resistant and other glassware which had been designated as the field belonging to respondent Corning. Petitioner was also prohibited from the manufacture of milk bottles, which was the protected field of respondent Thatcher. Petitioner was prohibited from manufacturing other types and kinds of glassware.

IV.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred in each of the following particulars:

1. In denying recovery of damages to petitioner for license fees and royalties paid by it to respondent Hartford, and secretly shared by Hartford with respondent Owens, a competitor of petitioner, under and pursuant to illegal license and lease agreements and during a period of time when Hartford and Owens and the others of respondents were engaged in a nationwide conspiracy, monopoly and combination in restraint of trade in the glass container industry in which petitioner was engaged until its tangible property was sold in receivership commenced on complaint of Hartford for unpaid license fees and royalties.

2. In misconstruing Section 5 of the Clayton Act in holding that the final judgment in the case of **U. S. v. Hartford Empire Company et al.** (46 F. Supp. 541), when admitted in evidence in the instant case, did not establish the fact of injury to petitioner's business and property under the circumstances of this case.

The conspiracy, monopoly and combination in which respondents except Stevenson were adjudged to have been engaged, were nationwide and effected and maintained a restraint of trade in the glass container industry, during the time petitioner was engaged in the said industry. Respondents rested, without going forward after petitioner's case was in. The final judgment, supported by the findings and conclusions of the Toledo Court, when admitted in evidence and without regard to petitioner's other evidence, established prima facie the fact of injury to petitioner's glass container manufacturing business and

property and since unrebutted by respondents is now conclusive on all except Stevenson.

3. In holding that petitioner "has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants (respondents) may have done."

It is undisputed and uncontradicted that at all material times respondents, except Stevenson, were adjudged to have been in violation of the Anti-trust laws affecting adversely the entire glass container industry of which petitioner was a part.

From 1924 to August of 1930 petitioner paid respondent Hartford more than $1,000,000 in license fees and royalties, which Hartford secretly divided with respondent Owens, a competitor of petitioner. Hartford also secretly permitted Owens to use 40 feeder and former machines free of royalty for the manufacture of glass containers. The secret sharing of royalties paid by petitioner and the free use of manufacturing machinery gave Owens a discriminatory competitive advantage over petitioner.

Petitioner's tangible properties were procured for some of respondents for a nominal sum in a receivership proceeding commenced by Hartford for unpaid license fees and royalties which also unbeknown to petitioner were to be shared with Owens under a secret agreement.

4. In failing to hold that petitioner was denied due process of law in that the Special Master and the Trial Court relied upon matter not a part of the record in the instant proceedings.

In the Toledo case, in which petitioner was not a party, counsel for all parties tendered proposed findings. [Petitioner was not a party to the Toledo case.] The Toledo Court did not adopt many proposed findings including certain proposed findings tendered by government counsel.

Copies of some of these proposed findings tendered by government counsel at Toledo were handed to the Special Master in the instant case by some of counsel for respondents at a pretrial conference. They were never offered nor admitted in evidence in the instant case but were relied upon by the Special Master and set out in full in his report (R. 564-566). Such use of matter outside the record is a denial of due process. The fact that the Toledo Court did not adopt the proposed findings was in no way an adjudication against petitioner. The impropriety of the use of these findings was presented to the Special Master, the Trial Court and the Circuit Court of Appeals.

V.

ARGUMENT.

A. Jurisdiction.

Complete jurisdiction is shown by the record since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. The jurisdiction of the Court is invoked under the Act of June 25, 1948, Chapter 646, Section 39, 62 Stat. 992, effective September 1, 1948 (28 U. S. C. A. 1254). The Petition for Certiorari was filed before the expiration of ninety days from March 7, 1949, the date of the decision of the Circuit Court of Appeals.

B. Right of Recovery of License Fees and Royalties.

The Circuit Court of Appeals erred in denying recovery of damages to petitioner for license fees and royalties paid by it to respondent Hartford.

The Toledo Court adjudged that the respondents, except Stevenson, had violated Sections 1 and 2 of the Sherman Act and in the case of respondent, Hartford, Section 3 of the Clayton Act, in that the said respondents had conspired, combined and monopolized and restrained interstate trade and commerce in the glass container manufacturing industry.

The Toledo Court concluded as a matter of law that the license agreements between respondent Hartford and manufacturers of unpatented glassware, of which petitioner was one, which contained restrictions designed to result in a restriction or stabilization of the production of unpatented glassware and which had that effect, were in violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act (15 U. S. C. A. 1) provides in part:

> "Every contract in restraint of trade or commerce among the several states is hereby declared to be illegal."

Petitioner became a licensee of Hartford in 1923 by reason of the unlawful acquisition (46 F. Supp. 541, 557) by Hartford of the Howard Automatic Machinery Company, then a competitor of Hartford (R. 692, 693).

Petitioner continued as a Hartford licensee until its receivership upon complaint of Hartford for unpaid license fees and royalties (R. 540, 1033-1036). Petitioner's license and lease agreements with Hartford each contained restrictions held violative of the Sherman Act by the Toledo Court (R. 541, 547-548; actual representative agreements, R. 1362-1999).

As an example, petitioner's license and lease of Hartford's single feeder 277 required it to pay a license fee of $2500, the insurable value of the machine being $2500 (R. 1565); it was for an initial term of eight years with one renewal privilege, title remained in Hartford; the machine could be used only at Winchester, Indiana; it was not assignable, transferable nor could it be sublet. Petitioner was required to pay a minimum royalty of $1500 per year. The schedule of royalties to be paid on number of containers produced which varied with the finished weight, was affixed as a schedule to the license and lease. Petitioner agreed in the license not to dispute the validity of Hartford patents. Hartford had the right to revoke petitioner's license and lease for a violation of any of Sections 1, 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 20 or 21. This revocation clause placed petitioner always at Hartford's mercy.

This Agreement also contained a specification of unpatented glassware which the petitioner was permitted to manufacture on the leased machinery. Petitioner was prohibited by the licenses from manufacturing various types and kinds of unpatented glassware which were considered by respondents to be the exclusive fields of Corning, Hocking and Thatcher. Petitioner was also prohibited from making certain mold blown glass, certain pressed ware, tumblers, fruit jars, lantern globes, gas globes, chimneys, vault lights, battery jars and containers among others (PX. 1315, p. 24, R. 1561).

Under others of petitioner's licenses and leases it could make bottles for grape juice and unfermented fruit juices, but could not make them for fermented Sacramental wines; it could make bottles for varnish but not for varnish remover; it could make bottles for bluing but not for bleaching fluids and it could make bottles for ink but not for ink eradicators. There were also many others that petitioner was prohibited from manufacturing under penalty of having its licenses cancelled by Hartford.

Petitioner's lehr licenses required it to use the lehr only with Hartford machinery (R. 548-549, 1032).

The restrictions and limitations contained in petitioner's licenses and leases were adjudged illegal and specifically enjoined by the Toledo Court (R. 852-853; para. 19A, R. 886).

Patent grants do not permit the use of the patents to monopolize an industry through royalties drawn from unpatentable products. These royalties collected and the control of production and distribution are in violation of the Anti-trust laws. **Hartford-Empire v. U. S.**, 323 U. S. 386, 406, 443; **U. S. v. U. S. Gypsum Co.**, 333 U. S. 364, 400; **U. S. v. National Lead Co.**, 332 U. S. 319, 367-368; **U. S. v.**

Line Material Co., 333 U. S. 287; **Standard Oil Co. v. U. S.**, 283 U. S. 163, 169-74; **Standard Sanitary Manufacturing Co. v. U. S.**, 226 U. S. 20; **Interstate Circuit, Inc., v. U. S.**, 306 U. S. 208; **Blount Mfg. Co. v. Yale & Towne Mfg. Co.**, 166 Fed. 555.

The Toledo Court stated that:

> "Hartford, by the leverage of its licensing contracts, resting on the fulcrum of its patents, has built a combination that exercised a dominance and control **over the entire glass container industry**, that carry it far beyond the privileges granted in its patents; **it has built up other monopolies not embraced in that granted by the patent**" (46 F. Supp. 541, 616). (Emphasis supplied.)

Not only were the license and lease agreements inherently illegal and void by reason of their restrictive provisions but were also illegal and void under the Anti-trust laws as agreements that were essential parts of an illegal scheme. **Continental Wall Paper Co. v. Louis Voight & Sons Co.**, 212 U. S. 227, 261. The purpose and effect of the conspiracy, combination and monopoly was to control the glass container industry by the unlawful restrictions in the license and lease agreements. These restrictions enforced the division of fields of ware among the conspirators and also restricted production.

It was adjudged by the Toledo Court that Corning was given the heat resistant field and other manufacturers were excluded therefrom by the license agreements. Thatcher was protected in the milk bottle field. Others were protected by Hartford in other fields. Petitioner, as previously pointed out, was prohibited from manufacturing in the Corning, Thatcher and Hocking field. Some of Owens ware was also protected by Hartford under the restrictive covenants.

Thus, the license agreements were an inherent part of an unlawful scheme with their object and effect the accomplishment of illegal ends and therefore void. **Continental Wall Paper Co. v. Louis Voight & Sons Co.**, 212 U. S. 227; **American Equipment Co. v. Tuthill**, 69 F. (2d) 406; **Bruce's Juices v. American Can Co.**, 330 U. S. 743, 755.

The Toledo Court (46 F. Supp. 541, 621) and the Master in this case by quoting from that decision (R. 552-553) found:

> "It is through the licensing and lease system that Hartford retains control over and dominates the industry. It is in this manner that Hartford maintains a system of stabilization of the industry and enforces restrictions and conditions far beyond the privileges of the patent grant."

The findings of fact and the conclusions of law of the Toledo Court adjudged the illegality of the license and lease agreements, both as inherently illegal and as illegal parts of a scheme and plan in violation of the Anti-trust laws.

A portion of the license fees and royalties which petitioner paid to Hartford were secretly shared by Hartford with Owens, a competitor of plaintiff, and in addition to Owens' receipt of these funds from Hartford which were paid to Hartford by Owens' competitors, Owens was given by Hartford the further additional competitive advantage of 40 feeders and formers free of royalties and license fees. This secret sharing of the royalties with Owens and giving it machinery free of charge was for the precise purpose of giving Owens an advantage over its competitors (R. 703-705). The Toledo Court said in this regard that:

"Owens was to have a share in all of the income produced by royalties collected from its competitors. This, of course, had the effect of placing Owens in a position of decided advantage over all other manufacturers of glass products who produced the same lines of ware produced by Owens" (46 F. Supp. 541, 570).

The findings and conclusions of the Toledo Court were sustained by this Court in the following language:

"Little need be said concerning the legal principles which vindicate the District Court's findings and conclusions as to the corporate appellants and the individual appellants who as officers or directors participated in the corporate acts which forwarded the objects of the conspiracy * * *.

"The difference between legitimate use and prohibited abuse of the restrictions incident to the ownership of patents by the pooling of them is discussed in **Standard Oil Co. v. U. S.**, 283 U. S. 163 * * * Application of the tests there announced sustains the District Court's decision. It is clear that, by cooperative arrangements and binding agreements, the appellant corporations, over a period of years, regulated and suppressed competition in the use of glass making machinery and employed their joint patent position to allocate fields of manufacture and to maintain prices of unpatented glassware" (323 U. S. 386, 406).

Thus, petitioner paid royalties and license fees to respondent Hartford which were secretly shared with Owens under agreements intrinsically illegal and also illegal and void as an inherent part of an unlawful conspiracy, combination and monopoly in violation of the Anti-trust laws.

Petitioner is entitled to recover as damages in this action under the Anti-trust laws treble the amount of license

fees and royalties it paid to Hartford and pursuant to the illegal agreements. **Continental Wall Paper Co. v. Louis Voight & Sons**, 212 U. S. 227; **Morton Salt v. G. S. Suppiger Co.**, 314 U. S. 488; **American Equipment Co. v. Tuthill**, 69 F. (2d) 406; **Bruce's Juices v. American Can Co.**, 330 U. S. 743.

The exaction by Hartford from petitioner of the license fees and royalties was illegal and injured petitioner directly in its business and property by requiring the payment of money wrongfully induced. **Chattanooga Foundry & Pipe Works et al. v. City of Atlanta**, 203 U. S. 390, 396.

Mr. Justice Rutledge, concurring with the majority opinion in sustaining the Toledo Court (323 U. S. 386), recognized the merits of petitioner's position when he said at page 443:

> "Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy."

Cf. **U. S. v. National Lead Co.**, 332 U. S. 319, dissenting opinion as to the form of decree at page 367.

To permit recovery as suggested by Justice Rutledge would be of great public importance as a deterrent to violators and would be of substantial and material value in the future enforcement of the Anti-trust laws.

C. Misconstruction by Circuit Court of Appeals of Section 5 of the Clayton Act.

The Circuit Court of Appeals misconstrued Section 5 of the Clayton Act when it held:

"It must be conceded that plaintiff (petitioner) cannot maintain an action under the provisions of section 7 of the Sherman Act unless it has suffered an injury in its business or property by reason of the violation by the defendants (respondents) of some of the prohibitions contained in that Act . . . It must show that it was injured . . . And the mere fact that the defendants have been adjudged guilty in the Toledo case is of no avail to plaintiff unless it establishes that it sustained pecuniary damage . . . The plaintiff must show **personal**, pecuniary damages . . . which must be proved by facts from which their existence is logically and legally inferable . . ." (R. 2158-2159).

Section 5 (15 U. S. C. A. 16) provides in part that:

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the Anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ."

The final decree, as well as the findings and conclusions of the Toledo Court, were admitted in evidence in the instant case.

The final judgment of the Toledo Court determined that two or more of the respondents here, except Stevenson (R. 863-865),

(a) "Have contracted, combined and conspired to restrain trade, and have monopolized, attempted to monopolize, combined and conspired to monopolize

trade, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act."

(b) "In violation of Sections 1 and 2 of the Sherman Anti-Trust Act, have monopolized the manufacture of oven ware; have attempted to monopolize, combined and conspired to monopolize, and contracted, combined and conspired to restrain trade in signal, optical, oven, chemical—and heat—resistant ware, and in bulbs, tubing, and cane."

(c) "Have monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act with respect to the manufacture of glass containers."

(d) "Have monopolized, attempted to monopolize, combined and conspired to monopolize and contracted, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act with respect to the manufacture of milk bottles."

The final decree established violations of sections 1 and 2 of the Sherman Act. It likewise established that two or more of respondents had monopolized and restrained trade in the manufacture of glass containers, milk bottles and certain types of ware such as heat and chemical resistant, oven and optical ware, etc.

Petitioner alleged in its amended and supplemental complaint (R. 10) that it "formerly, and during the commission of the acts and the consummation of the combination and conspiracy hereinafter alleged was engaged in the manufacture and sale of glass containers and other glass products in interstate trade and commerce in the United States . . ."

Each of the respondents, except Corning Glass Works, Glass Container Association and The Stevenson Corpora-

tion, admitted that a corporation known as Turner Glass Corporation was until about December 27, 1930, engaged in the manufacture and sale of glass containers in interstate trade and commerce in the United States.

The violations of the Sherman and Clayton Acts, the monopoly and restraints of trade in the manufacture of glass containers were violations of duties owed by respondents to petitioner and others in the glass container industry imposed by the Sherman and Clayton Acts. These violations were established by the Toledo decree since the violations affected the entire glass container manufacturing industry in which plaintiff was engaged. The complaint, answers and Toledo decree established the fact of injury to petitioner at least presumptively. When respondents did not go forward to rebut this presumption of the fact of injury the presumption became conclusive.

D. **The Circuit Court of Appeals Erred in Holding That Petitioner "Has Offered No Evidence to Prove That It Has Sustained Any Pecuniary Damage by Reason of Anything the Defendants (Respondents) Have Done."**

Respondents were adjudged by the Toledo Court to have violated the Sherman and Clayton Acts and to have monopolized and restrained trade in interstate commerce in the entire glass container industry, in which petitioner was engaged.

Petitioner was known in the industry as a price cutter but by virtue of its being a licensee of respondent Hartford the usual strategy employed by respondents to destroy price cutters, viz., expensive litigation charging patent infringement, as is set out in the opinion of the Toledo Court (46 F. Supp. 541), was unavailing. Thus, other means were sought by respondents to get prices under con-

trol by eliminating petitioner. On August 15, 1930, Mandeville, who was the nominee of the purchaser of petitioner's properties at the receiver's sale, went to Indianapolis. As a result of his visit in Indianapolis he wrote Mr. Levis, President of respondent Owens, as follows (R. 2023):

> "I am just back from Indianapolis. I had some of our men there two or three days ahead of me to check up on costs and the figures submitted by Mr. Hartley. We have been at this so long that it was a disappointment to know that he has been fooling himself. This is the best construction I can put on it. I cannot go into the details because I suppose they were given me in confidence. I can say that a major operation is necessary before the Turner Glass Company is in shape for anyone to consider. It must be put through the wringer. I told his executive committee so and we had the figures to prove it.
>
> "Please do not say anything about this to anyone. I told his committee that when they had been through the operation we would be interested in the remains on a proper basis.
>
> **"I am going ahead with some other companies. I wanted to dispose of this company, but it will be some time before anything further can be done.**
>
> "I think Mr. Hartley gets an idea and acts upon it before his facts are demonstrated.
>
> "I am saying nothing about this to anyone but **Mr. McNash** (Pres. of Hazel), and am asking him to keep it to himself." (Emphasis supplied.)

The above letter shows clear intent to destroy petitioner.

The Toledo Court found as a fact that certain representatives of respondents intended "to take over" petitioner. Finding 605 of the Toledo Court (R. 824) was as follows:

"Stanton Griffis was a director of Thatcher from at least September, 1928, until January 1, 1941. In July, 1930, Mandeville wrote Griffis that Thatcher 'cannot correct prices until we get the Turner Company under control' (Ex. 1843). To get Turner under control Mandeville proposed to give Hartley, president of Turner, a block of Thatcher common stock. Shortly thereafter, Hartley was invited by Mandeville and Griffis to Griffis' yacht where Mandeville and Griffis offered him 20,000 shares of Thatcher stock 'to send the Turner Glass Company through the wringer' (R. 5436). After General was formed to take over Turner, Griffis was elected director of that company, and he attended a directors' meeting in April, 1933, at which all of General's contracts were approved."

On December 27, 1930, respondent Hartford filed a complaint against petitioner in the Federal District Court for the Southern District of Indiana, and prayed that a receiver be appointed. The complaint was for unpaid license fees and royalties. A receiver was appointed and in due course petitioner's property was sold to Mandeville, a nominee for a corporation formed pursuant to an agreement among respondent Hartford and Thatcher and Hocking Glass Company, not a party here. As hereinbefore pointed out, all of petitioner's tangible property, including two glass container manufacturing plants and all of the outstanding common stock of a corporation which operated a glass container manufacturing plant in West Virginia, was acquired for a nominal sum. Many of petitioner's key personnel were also taken over by some of the respondents.

Even though petitioner was in financial difficulties the Circuit Court of Appeals has completely overlooked the fact that the payment of excessive and burdensome license fees and royalties under void licenses was a pecuniary

injury to petitioner's business and property, and that no matter that petitioner was in financial straits it still had the right to live. **Columbia Gas and Electric Corporation v. U. S.**, 151 F. (2d) 461. The filing of the complaint for receivership for petitioner by respondent Hartford was at least an overt act in furtherance of the conspiracy, combination and monopoly in which the respondents except Stevenson were adjudged to have been engaged, and which act resulted in pecuniary damage to petitioner's business and property, for which it is entitled to recover.

E. Reliance Upon Matters Dehors the Record—a Violation of Fundamental Right.

In the course of proceedings prior to the trial of this cause respondents handed to the Master certain proposed findings tendered by Government Counsel to Toledo Court which were not adopted by the Court in that case.

Petitioner was not a party to the Government action at Toledo.

These proposed findings, termed by respondents "rejected findings" were never offered in evidence in this case and form no part of the record. Notwithstanding this, they have been urged by respondents in the Trial Court and on appeal as "decisions adverse to plaintiff's claims."

The Master, traveling beyond the record, relied directly upon these rejected findings to support his ultimate conclusion of fact in his finding No. 40 (R. 564) that the Toledo Court did not adjudge that respondents while violating the Anti-trust laws caused any injury to Turner's business or property. In support of this conclusion, he states:

"The Court (Toledo Court) did not make or enter the following Findings of Fact which were requested by the Government, to-wit:"

Set out thereafter in full are certain rejected findings.

The District Court affirmed the Master's findings without modification (R. 665). The question of reliance upon this matter extraneous to the record was squarely presented on appeal (R. 2147-2148). The Court of Appeals' decision by affirming the District Court without reference to the question sanctions the determination based upon these proposed findings which are no part of this record.

The finding of the Master, unsupported by evidence, is arbitrary and baseless. **Interstate Commerce Commission v. L. & N. R. R. Co.**, 227 U. S. 88. Moreover, any consideration of the proposed findings extraneous to the record was improper and constituted prejudicial error. **Parridy v. Caterpillar Tractor Co.**, 48 F. (2d) 166; **Divide Creek Irrigation Dist. v. Hollingsworth**, 72 F. (2d) 859; **Funk v. Commr. of Internal Revenue**, 163 F. (2d) 796.

The reliance upon these rejected findings, not contained in the record, ignores the minimum requirements of a fair hearing assured by due process and constitutes prejudicial error. In **Ohio Bell Telephone Co. v. Public Utilities Company**, 301 U. S. 292, in which the lower court's decision was condemned for reliance upon "findings of a Federal Court • • • which findings were not in evidence," the Court stated, pp. 304-305:

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.

• • • • • • •

"The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement."

The Court in the **Ohio Bell** case in reversing held that the Commission made a determination (page 307):

> "Without reference to any evidence, upon proof drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights."

The consideration and reliance upon the proposed findings which are not in the record in this case as a basis for determination is a denial of due process and constitutes such a departure from the accepted and usual course of judicial proceedings, sanctioned by the Circuit Court's acquiescence, as to call for the exercise of this Court's power of supervision.

Petitioner respectfully submits that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Seventh Circuit in the instant case.

Respectfully submitted,

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June 1, 1949.

APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1948, January Session, 1949.

No. 9633

Turner Glass Corporation,
Plaintiff-Appellant,
vs.
Hartford-Empire Company, Owens-Illinois Glass Company, Hazel-Atlas Glass Company, Corning Glassworks, Thatcher Manufacturing Company, Glass Container Association of America, Inc., The Stevenson Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana.

March 7, 1949.

Before Major, C. J., Kerner, J., and Wham, District Judge.

Kerner, J. By this appeal plaintiff challenges the propriety of a judgment dismissing its complaint after a trial upon the merits.

Plaintiff, basing its claim upon a decree entered by the District Court of the Northern District of Ohio (46 F. Supp. 541, affirmed, 323 U. S. 386, and 324 U. S. 570), hereinafter referred to as the Toledo case, sued defendants to recover five million dollars together with treble damages alleged to have been sustained by defendants' viola-

tion of §§1 and 2 of the Sherman Act (15 U. S. C. A. §§1 and 2) and §3 of the Clayton Act (15 U. S. C. A. §14). In the **Toledo** case, the court adjudged the defendants, except The Stevenson Corporation, guilty of a conspiracy, combination and monopoly in obtaining and licensing patents in glass making machinery, and in limiting and restricting the use of the machinery.

Plaintiff's complaint alleged a conspiracy substantially in the language of the **Toledo** complaint, and averred that the restrictive licensing policy of the defendants under their patents, and the royalties and license fees paid by plaintiff to Hartford during the period of the conspiracy, placed plaintiff at a competitive disadvantage which directly caused injury and damage to plaintiff's business and property.

After defendants had filed answers, the cause was referred to a master to take testimony and report the same with his findings of fact, and state his conclusions of law thereon. The master took the testimony of the witnesses, reported more than 13,000 pages of testimony and stipulations, admitted in evidence 1,221 exhibits, and filed his report in which he made 42 findings of fact, among which was one that license fees and royalties had been paid by plaintiff from 1923 to August 4, 1930 under certain license and lease agreements, but concluded that the law was with defendants and recommended that the cause be dismissed. Exceptions to the report were filed and overruled and the report of the master was approved by the court.

The court found inter alia that plaintiff, an Indiana corporation, has, since 1893, been engaged in the manufacture of glass containers, and that prior to 1920 its entire business has been the manufacture of whiskey and beer bottles; that this business was destroyed by the advent of

national prohibition, and that plaintiff was obliged to seek other fields of ware or go out of business. It began the production of various kinds of blown glassware, and during 1920, for the purpose of obtaining better operating results, it equipped its plant with automatic feeders manufactured by the Howard Automatic Machine Company. The use of these feeders did not bring satisfactory results.

In 1923 Hartford became the owner of the Howard patents. During the same year, plaintiff, finding its operating results for prior years so unsatisfactory that its officers and stockholders considered closing the plant, sought and obtained the advice of one Hartley. Thereafter, Hartford and plaintiff entered into license and lease agreements for the use by plaintiff of Hartford's patented machinery and for the servicing thereof. Thereafter it received the benefits which resulted from Hartford servicing the machines used by plaintiff, and plaintiff was in a position to obtain Hartford's most improved equipment. One of the first services rendered by Hartley, who later became president of plaintiff, was to obtain an agreement from Hartford to extend credit to plaintiff for new equipment needed to increase its plant efficiency and production. Acting under Hartley's advice, plaintiff adopted a policy of expansion, sought a wider range of products and an increased production through the acquisition or control of other glassware manufacturers. Favorable results followed. In 1924 it made a net profit of $109,356, and thereafter until the end of the third quarter of 1929 plaintiff had net earnings averaging more than $150,000 per year.

In 1929 the entire glass industry was adversely affected by the severe business depression which began during the summer. Prices declined, and competition became more difficult to meet. Plaintiff decided that it would need improved Hartford equipment in order to speed up and in-

crease its production and reduce overhead costs. It acquired additional feeders and annealing lehrs, in the expectation of obtaining increased volume by concentrating on sales of low-priced ware, and at the end of the first three quarters of 1929 it had earned about $229,000 more than in any prior full year of operation, but for the balance of that year plaintiff suffered steadily mounting losses totalling about $100,000. Losses continued throughout 1930, and by August 1930 it was obvious that plaintiff could not continue unless some method of refinancing could be found. These losses, the court found, could not be attributed to any cause for which defendants had any responsibility or over which they had any control. After a series of negotiations, a meeting of plaintiff's creditors and bondholders was held. Those present agreed that the appointment of a receiver was unavoidable, and a complaint was filed against plaintiff in the United States District Court for the Southern District of Indiana, to which plaintiff filed an answer, and a receiver was appointed. The receiver, having no capital, suspended plant operations and began to arrange a sale. Authority to sell at public auction was procured on December 27, 1930, and on April 3, 1931 the receivership assets were sold subject to confirmation by the court. The court confirmed the sale on April 4, 1931, and thereafter, in May 1932, the receiver's administration of plaintiff was approved, the receivership proceedings were closed and the receiver discharged.

The court also found that the evidence did not establish that Hartford, Owens, Hazel-Atlas, Corning or Glass Container ever engaged in any conspiracy or violated the United States anti-trust laws except as adjudicated in the **Toledo** case, or that any of the defendants caused plaintiff's failure or caused any injury to plaintiff's business

or property, and that in the **Toledo** case, Judge Kloeb had held that "the Hartford royalties have been passed on to the ultimate consumer as a part of the price of glassware."

In this court, pursuant to plaintiff's request and suggestion that only certain questions of law be considered on this appeal, all of the oral testimony and all of defendants' exhibits were omitted from the record, and it now includes only 38 of the 1,221 exhibits: In this state of the record, we must accept the findings as correct. **Carter Oil Co. v. Norman,** 131 F. 2d 451, 456. They cannot be questioned on appeal, **United States v. Title Guarantee & Trust Co.,** 133 F. 2d 990, 995, and **Howard v. Chicago, B. & Q. R. R. Co.,** 146 F. 2d 316, but, of course, if the findings are based on documentary evidence alone, we are permitted to determine any question of fact. **Carter Oil Co. v. McQuigg,** 112 F. 2d 275. Fortunately, there is no question here involving conflicting testimony. The facts are not in dispute.

It must be conceded that plaintiff cannot maintain an action under the provisions of §7 of the Sherman Act unless it has suffered an injury in its business or property by reason of the violation by the defendants of some of the prohibitions contained in that Act, **Jack v. Armour & Co.,** 291 Fed. 741, 745; **Northwestern Oil Co. v. Socony-Vacuum Oil Co.,** 138 F. 2d 967. It must show that it was injured, **Alden-Rochelle v. American Soc. of Composers, etc.,** 80 F. Supp. 888, 897, and the mere fact that the defendants have been adjudged guilty in the **Toledo** case is of no avail to plaintiff unless it establishes that it sustained pecuniary damage. **Keogh v. Chicago & N. W. Ry. Co.,** 271 Fed. 444, 447, and **Twin Ports Oil Co. v. Pure Oil Co.,** 119 F. 2d 747. The plaintiff must show personal, pecuniary damages, **Maltz v. Sax,** 134 F. 2d 2, 5, which must

be proved by facts from which their existence is logically and legally inferable, **Keogh v. Chicago & N. W. Ry. Co.**, 260 U. S. 156, 165. Without actual damages to plaintiff, there can be no recovery. **Maltz v. Sax**, supra, and **Beegle v. Thompson**, 138 F. 2d 875, 881.

Plaintiff says it has suffered an injury. It has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants may have done. We have already observed that Judge Baltzell found that the evidence failed to establish that any of the defendants caused plaintiff's failure or caused any damage to plaintiff's business or property. He found as a fact that before plaintiff became a Hartford licensee, its operating results had been unsatisfactory, and that it was not until plaintiff received Hartford service on its Howard machines that satisfactory results ensued. However, in its briefs plaintiff contends that the payment of the license fees and the entry of the judgment in the **Toledo** case was evidence of pecuniary damage, and upon oral argument its counsel stated that if the license agreements are legal, plaintiff "is out." We take this to mean that, in the event we hold that the agreements are not inherently illegal, the judgment must be affirmed. Accordingly we address ourselves only to that contention.

To be sure, for the purposes of this case, the conspiracy to violate the anti-trust laws found at Toledo is established, and, of course, an agreement essentially a part of a scheme to fix the price or curtail the quantity of an unpatented ware would be in violation of the anti-trust laws, **Continental Wall Paper Co. v. Louis Voight and Sons**, 212 U. S. 227; **American Equipment Co. v. Tuthill**, 69 F. 2d 406, 409; and **United States v. Line Material Co.**, 333 U. S. 287. But a patentee may grant a license upon any condi-

tion if its performance is reasonably within the reward which the patentee is entitled to secure. **United States v. General Electric Co.**, 272 U. S. 476, 489.

Our study of the **Toledo** case has not convinced us that the inherent illegality of the agreements in our case was considered or decided in that case. We find no language in either opinion of the Supreme Court relating to inherent invalidity of the agreements. It is true, however, that Judge Kloeb said: "* * * a license and lease system may be perfectly legal and just if properly used. However, in the instant case, there has been a deliberate abuse and misuse of that system" (46 F. Supp. 621). In using the quoted language we think the illegality found was that of the licensing system as a whole, in view of the manner in which the court found that it had been used. It in no manner was dependent on illegality of the agreements here involved.

We believe we find the solution of our problem in what was said in **Gasoline Products Co. v. Champlin Refining Co.**, 46 F. 2d 511, and cases cited therein.

The plaintiff in the **Gasoline Products** case sued defendant to recover royalties under a license agreement. Defendant, as in our case, contended that the agreement was illegal because plaintiff was engaged with others in a conspiracy to violate the anti-trust laws by means of a patent pool for the purpose of establishing a monopoly, fixing prices, controlling the market and extorting huge profits from defendant and others engaged in the manufacture of cracked gasoline, and that the license agreement was issued in furtherance of the illegal combination. The court in rejecting the defense, at page 514 said: "As the contract is admittedly valid on its face, involving the doing of no wrongful act, by its terms an ordinary and

legitimate business transaction, between parties authorized to contract, it is apparent that the defendant, who voluntarily entered into it, must go somewhere back of and outside of the contract to show its illegal nature. This it does or attempts to do by pointing out that the combination was formed for the purpose of stifling competition and fixing prices in its cracking business; and that the contract sued on partakes of the illegal purpose of the plaintiff, is an essential part of its wrongful scheme, and is a method of carrying it out and reaping the profits made possible by the monopoly.

"The defendant was not a party to the cross-license agreements and I can see no force in the argument that the mere purchase of a sublicense from the alleged illegal combination makes the purchaser a party to it.

"The contract in suit is complete in itself, involves the doing of nothing illegal, and is enforceable without reference to any other agreement. I fail to see how there can be any illegality 'inherent' in one contract when it is necessary to go wholly outside of it and into another contract to find illegality."

We find additional support for the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust law violations. **Bruce's Juices v. American Can Co.**, 330 U. S. 743, was an action to recover on notes given for the purchase price of cans. The defendant pleaded that the consideration for the notes was illegal and the notes void because plaintiff had violated the Robinson-Patman Act. In holding that recovery on the notes could not be defeated by the defense asserted, the court, at page 755, said: "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which

has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute [Sherman Anti-Trust Act]. • • • But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit • • •."

In our case, Hartford was the owner of the patents. Their validity was not challenged in the **Toledo** case, nor is their validity attacked here, hence Hartford had the right to lease the machinery covered by the patents. Having that right, and plaintiff desiring to use the machinery, it voluntarily entered into agreements which conferred upon it the right to use the leased machinery in the United States, for the manufacturing of glassware defined as "Permitted Ware." Limiting the use of leased machinery is within the prerogative of a patentee. Compare **General Talking Pictures v. Western Electric Co.**, 305 U. S. 124. The agreements were complete in themselves, and by the agreements plaintiff secured Hartford's property and received all the benefits of the use of the machines for which it paid the agreed license fees and royalties. The agreement did not fix prices so as to come within the rule enunciated in **United States v. Line Material Co.**, supra, or limit the quantity of ware that plaintiff could produce, or the markets in which plaintiff's glassware could be sold. See **American Equipment Co. v. Tuthill**, supra. They did not involve the doing of anything illegal, and each of the agreements was enforceable without reference to any cross-license agreement or agreements into which the defendants might have entered among themselves.

Under these circumstances we are impelled to the conclusion that the licensing agreements were not inherently illegal. Accordingly the judgment of the District Court is affirmed.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
OWENS-ILLINOIS GLASS COMPANY,
HAZEL-ATLAS GLASS COMPANY,
CORNING GLASS WORKS,
THATCHER MANUFACTURING COMPANY,
GLASS CONTAINER ASSOCIATION OF AMERICA, INC.,
THE STEVENSON CORPORATION,
Respondents.

No. .....

MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

Petitioner respectfully moves the Court and requests that the requirements of paragraph 7 of Rule 38 of the rules of this Court be dispensed with and the record not be printed for consideration of the Court.

The record was not printed in the Circuit Court of Appeals pursuant to order of Court (R. 2143) made on petitioner's motion for a waiver of the rule requiring printing.

Petitioner has not been engaged in business since its property was sold in a receivership proceedings commenced by complaint of respondent Hartford. It has no

funds or other available assets except this cause of action.

None of the stockholders of petitioner who are listed in the record (R. 2137) is singly or are together, able, so far as can be determined, to advance funds to defray the costs of printing. The above statement does not apply however, to approximately nine shareholders (who own 17,050 shares of petitioner) and each of whom has been or now is connected with one or more of respondents (R. 2139).

Counsel believe that petitioner has a meritorious cause of action and that the questions presented by its petition are of substantial importance.

Counsel for respondents have an unprinted record, conformed to the record lodged with the Clerk of this Court, available for their use. Two complete additional copies of the unprinted record have been lodged with the Clerk of this Court.

Wherefore, petitioner prays its petition for a writ of certiorari may be determined on the record lodged with the Clerk of this Court and that the requirements of paragraph 7 of Rule 38 be dispensed with for such determination.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

TURNER GLASS CORPORATION, *Petitioner*, *vs.* HARTFORD-EMPIRE COMPANY, *et al.*, *Respondents.*	No. 831

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

This damage action is based on violations of the anti-trust laws considered by this Court in *Hartford-Empire* v. *U. S.*, 323 U. S. 386, 324 U. S. 570, 46 F. Supp. 541 (the "*Toledo* case"). As hereinafter shown, there is nothing in any of the opinions in that case supporting petitioner's claim of injury resulting from any such violation.

PROCEEDINGS BELOW

This case was tried before a Special Master. An extensive hearing resulted in a record of more than 13,000 pages, including more than 2,000 typewritten pages of oral testimony and more than 1,200 exhibits. Respondents rested at the close of petitioner's evidence. However, 75% of the oral testimony consisted of cross-examination and 353 exhibits were introduced as a part thereof.

The Master made a detailed finding of facts, 195 printed pages in length (R. 374 to 568). His conclusion was that while respondents, other than Stevenson Corporation* and Hazel-Atlas Glass Company,** as found in the *Toledo* case, had been engaged in a conspiracy to violate the anti-trust laws for several years prior to the receivership of petitioner and the resulting sale of its property, the latter had failed to establish that it sustained any injury as a result.

The District Court overruled objections to the Master's Report, made a finding of facts, 95 pages in length (R. 570 to 665) and entered judgment for respondents.

In the Court of Appeals petitioner requested a waiver of Rule 14 requiring printing of the record. Upon denial of the request, it filed a petition for such a waiver with respect to a greatly reduced record and at the same time requested permission to amend its Statement of Points so as to present only what it asserted to be three questions of law (R. 2100).

The shortened record in the Court of Appeals, which has been filed in this Court, together with a typewritten manuscript containing the proceedings in the Court of Appeals, omits all of the oral testimony and all but 38 of the exhibits, including all of respondents' exhibits. Petitioner has also filed a motion in this Court to waive the requirements of paragraph 7 of Rule 38 with respect to printing the record.

The Court of Appeals properly held that upon such a record no question with respect to the sufficiency of the

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*Stevenson Corporation was granted a summary judgment in the *Toledo* case. No evidence was offered against it here. No further reference will be made to it.

**It was found at Toledo and here that Hazel-Atlas did not join the conspiracy until July 1, 1932, a year and one-half after the appointment of a receiver for petitioner (R. 563, 661).

evidence to sustain the findings was presented and that such findings must be accepted as correct (Pet. Br., p. 43). This principle, as hereinafter shown, precludes consideration of some of the questions petitioner now attempts to present.

The scope of the Court of Appeals opinion was further narrowed by reason of a concession made by counsel for the petitioner during the argument. That court said:

> "* * * upon oral argument its counsel stated that if the license agreements are legal, plaintiff 'is out'. We take this to mean that, in the event we hold that the agreements are not inherently illegal, the judgment must be affirmed. Accordingly we address ourselves only to that contention" (Pet. Br., p. 44).

In its petition and brief, here, notwithstanding its specific concession, petitioner has again presented the three questions specified in its amended statement of points, together with an additional question not even presented to the Court of Appeals (*Infra*, p. 35).

The factual statements contained in the petition and brief are far from complete, and in view of the scope of some of petitioner's contentions a more comprehensive statement is required. All of the statements which follow appear in the findings. Most of them are stated in the opinion of the Court of Appeals (Pet. Br. pp. 40-42).

HISTORY OF PETITIONER

Petitioner was formerly engaged in the manufacture of glass containers in Indiana. Prior to 1920 it manufactured whiskey and beer bottles, originally by hand, and later by the use of semi-automatic equipment. This business was

entirely destroyed by the advent of national prohibition. Petitioner was faced with the alternative of closing its doors or establishing an entirely new business in other fields of ware. In 1920 it became a licensee of Howard Automatic Glass Machine Company and thus obtained a few automatic feeders. In 1922 Hartford acquired the Howard patents and feeders and in 1923 entered into new license agreements with petitioner (Fdg. 24, R. 595). There is no finding that petitioner was forced to enter into these agreements. The District Court found that the use of Howard feeders did not produce satisfactory results until petitioner obtained Hartford's service therefor (Fdg. 22, R. 595).

There is no finding as to earnings of petitioner prior to 1921. In that year it had only nominal earnings and in 1922 it suffered a large operating loss (Fdg. 23, R. 595). At the time it became a Hartford licensee in 1923, its officers and stockholders were considering closing the plant because of unsatisfactory operating results. In that year Hartford was requested to and did extend credit to petitioner for new modern equipment needed to increase its plant efficiency and production (Fdgs. 24, 25, R. 595-6).

As a result of becoming a Hartford licensee, petitioner, during the remainder of its business life, received the benefit which resulted from Hartford's servicing of the machines, and was at all times thereafter in a position to obtain Hartford's latest and most improved equipment (Fdg. 24, R. 595). Substantial quantities of such new equipment were obtained (R. 1033 to 1036). More favorable results followed.

In 1924 petitioner had a net profit of $109,000 and thereafter until the end of the third quarter of 1929 had net

earnings averaging more than $150,000 per year as against its prior losses (M. Fdgs. 25, 26, 27, 29, 31, 33, R. 597, 600, 608, 621, 628). In the first three quarters of 1929 it had earnings of $229,000, which was in excess of any prior full year. The entire glass industry, however, was adversely affected by the severe business depression, which became apparent during the summer of that year. Prices declined. Manufacturers began to curtail inventories and production. Competition became harder to meet. Petitioner decided that it needed more improved Hartford equipment to speed up and increase production and reduce its overhead costs. It acquired additional feeders and annealing lehrs, in the expectation of obtaining increased volume by concentrating on low-priced ware (Fdg. 33, R. 626). It entered into two year contracts with Great Atlantic & Pacific Tea Co. and Gold Dust Corp. for large quantities of ware at prices which proved to be below cost of production (Fdg. 33, R. 627).

Commencing with the approximate date of the stock market crash, petitioner began to suffer substantial and steadily increasing losses. For the fourth quarter of 1929 it lost $100,000 (Fdg. 33, R. 628) and losses continued throughout 1930. In June and July of that year it was forced to secure $400,000 of bank loans by a pledge of $250,000 of receivables, warehouse receipts for finished inventory of $140,000 and a minimum cash balance of $50,000 (Fdg. 34, R. 629-31).

The result was disastrous to petitioner. The bank transaction became known to its principal customers and destroyed their confidence in its ability to continue in business. By August of 1930 it was obvious that it could not go on without refinancing. It was unsuccessful in its attempts to

effect a merger or to sell its property. It sought help from Hartford, which paid for an audit of petitioner and was ready to advance money if a satisfactory reorganization could be effected. Hartford had given petitioner credit to the end of 1930 on its indebtedness for new equipment, and pending the reorganization efforts permitted arrearages of its entire royalties after the month of June until the appointment of a receiver in December (Fdg. 34, R. 632-41). A principal obstacle to refinancing was the refusal of A & P and Gold Dust to agree to any price increases (Fdg. 34, R. 635, 651).

After a long series of negotiations, detailed in the findings, a meeting of representatives of Hartford, Turner, the banks and the bondholders was held on December 27, 1930. All present agreed that the appointment of a receiver was unavoidable. The proceeding was immediately commenced (in the same court which heard this case) by Hartford as a creditor and a hearing was held on the same day at the joint request of counsel for Hartford and petitioner. Both petitioner's counsel and its president stated in open court that no course other than a receivership was possible (Fdg. 34, R. 644-50). The District Court found that such appointment prevented an unnecessary waste and dissipation of petitioner's property and assets and thereby benefited its general creditors. It further found that petitioner could not have continued even if no receiver had been appointed (Fdg. 34, R. 650-1).

The receiver was unable to operate and at once began to arrange for a sale of the properties. Respondent Thatcher held a $50,000 note and $500,000 second preferred stock as the result of an earlier sale of a plant to petitioner. Collins of Hocking Glass (later Anchor Hocking) and associates held a substantial minority of the common stock

of petitioner. To protect their investments, Thatcher and Hocking joined in bidding in the properties at a public sale, subject to a large bond issue and taxes, and organized General Glass Corporation, which operated one of the Turner plants (Fdg. 35, R. 651). Petitioner's statement (pp. 2, 5) that Hartford participated in forming General is erroneous (R. 536).

It may be noted in passing that the appraisal of the Turner properties to which petitioner refers, both in the petition and brief, was made as of August 5, 1927, more than three years before the receivership, for the purpose of interesting investment bankers and underwriters in the purchase of a proposed bond issue (M. Fdg. 32, R. 437).

In considering petitioner's various claims of damage, it should be borne in mind that it began its connection with respondents as a failing business about to close its doors; that in a period of about six years, due in a large measure to assistance by Hartford, it was transformed into a relatively prosperous business; and that while it failed, as did thousands of other concerns, to survive the economic crisis of late 1929 and the early thirties, the Master and the District Court upon a consideration of all of the evidence absolved the respondents of any responsibility therefor (M. Fdgs. 37, 38, 43, R. 533, 539, 567; Ct. Fdgs. 34, 35, 39, R. 651, 655, 663). Since only a small part of the evidence is in the record filed in this Court, no question with respect to such findings is presented for review.

CLAIMS ASSERTED IN COMPLAINT AND EFFECT OF TOLEDO DECISION

This cause was commenced in 1942, ten years after the discharge of the receiver and only a few months before the

decision of the District Court in the *Toledo* case. Originally the claim was that petitioner had sustained certain specific losses in consequence of the conspiracy established in the *Toledo* case (R. 2-62). The complaint alleged a conspiracy substantially in the language of the Toledo complaint, and charged that in pursuance thereof, respondents had caused petitioner to part with certain of its properties for less than their real value, and later, after failing to obtain its cooperation in stabilizing the industry, had caused it to take business below cost and forced it out of business by means of the receivership and ensuing sale of its properties to Thatcher and Hocking. Respondents were charged with having brought about such result chiefly through the aid of I. J. Collins and L. B. Williams, who had become stockholders, directors, and members of the executive committee of petitioner as a result of its acquisition of Monongah Glass Company, and their associate Fulton, also a director of Turner. (R. 49-56)

No right to recover royalties and license fees was asserted.

Collins, Williams, and Fulton were defendants in the *Toledo* case, as was Anchor Hocking Glass Corporation, the successor to Hocking Glass Company and General Glass Company, the purchaser at the receiver's sale. However, the District Court in the *Toledo* case dismissed Williams and Anchor Hocking and refused certain proposed findings of fact tendered by the Government which sought to connect many of the transactions complained of by petitioner with the conspiracy there found to exist.

The findings so tendered and refused appear in the record in this Court in *Hartford-Empire Co. et al.* v. *U. S.*, 323 U. S. 386, at pp. 7038 to 7041, and in the Master's Finding 40 at pp. 564 to 566 in this record.

While Collins and Fulton were retained as defendants by the Toledo District Court, this action was unanimously reversed by this Court despite the attempt of the Government to sustain it, largely by urging the evidence as to the Turner transactions. In reversing as to Fulton, and two other associates, this Court said:

> "We think the decree against them must be reversed for want of allegations in the bill sufficient to support a decree against them; because the findings made do not support the decree as to them; *because the refusal of findings requested by the Government exculpates them of participation in the conspiracy; and, finally, because the proofs fail to connect them with it*"* (323 U. S. 403).

And in dismissing as to Collins, this Court referred to the above statement and said:

> "* * * As in the case of the other appellants mentioned [Fulton, et al], the Government requested findings of fact which, if made, would have spelled out a connection between Collins and the other conspirators but these were refused by the judge. * * *" (323 U. S. 405).

The result of this action, of course, was to leave the petitioner with the burden of sustaining the charges based upon alleged activities of Collins, Williams, and Fulton without assistance from the Toledo judgment. This burden, as found by the Master and the District Court, it was wholly unable to discharge.

Since all of the charges of responsibility for the losses which resulted in petitioner's liquidation were found by the

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*All emphasis supplied unless otherwise indicated.

Master and District Court to be wholly groundless, petitioner presented in the Circuit Court of Appeals as its principal contention, that it is entitled to recover as damages treble the amounts it paid for the use of Hartford's machines, patents and services. The fundamental question is whether the finding of the District Court that the evidence failed to establish any injury to petitioner is erroneous. The question of whether proof of the payment of license fees and royalties established injury, as well as the other claims of petitioner with respect to injury, are discussed in the Argument which follows.

II.

ARGUMENT

A. Recovery of License Fees and Royalties Was Properly Denied.

1. Analysis of Petitioner's Contention

The net effect of the recovery of royalties and license fees sought by petitioner would be to give it the use of Hartford's equipment and services for a period of seven years free of charge, and to award it an additional recovery of double the amount paid because the equipment and services were not furnished free of charge in the first instance.

Obviously such a recovery would bear no relation to any damage sustained by petitioner. It does not contend and obviously could not contend, that except for its agreements with Hartford it could have obtained equipment and engineering services without cost. Moreover, the recovery

sought is in no way connected with petitioner's failure and liquidation.

Any principle which would support a recovery for petitioner would likewise sustain a recovery by all other Hartford licensees however prosperous. Indeed, the greater the volume of business of the licensee the greater would be the damage sustained, if the contention is tenable. A theory which would produce such an anomalous result is at least suspect from the start.

The claim that petitioner was improperly denied the right to recover, as damages sustained by violations of the anti-trust laws, all royalties and license fees paid as a licensee of respondent Hartford is built upon the following assumptions:

(a) That its license agreements were illegal because violative of the anti-trust laws, either because of their provisions, or because they were integral parts of an illegal scheme.

(b) That because of such illegality they would not have been enforced by the courts.

(c) That payments made under agreements which would not be enforced by the courts, if challenged, are illegally exacted and may be recovered threefold as damages sustained from anti-trust law violation.

Respondents' position is that the license agreements were not inherently illegal and were enforceable between the parties; and that even if they had been unenforceable because of illegality, amounts paid thereunder could not, under fundamental principles, be recovered as damages suffered in consequence of violation of the anti-trust laws.

It is clear that what petitioner actually seeks to recover is not in any sense damages sustained from violation of the anti-trust laws, but profits which it insists it could have realized by refusing payment for benefits received, although obviously Hartford in no event could have been required to continue to supply equipment and services for which petitioner refused to pay. It urges that to permit such a recovery would be of great public importance as a deterrent to violators and would thus aid in the enforcement of the anti-trust laws. But as stated in *Clark Oil Co.* v. *Phillips Petroleum Co., et al.,* 148 F. (2d) 580, 582, (8th Cir. 1945) cert. den. 326 U. S. 734:

> "* * * The Sherman Act and the Clayton Act afford a cause of action for those suffering damages. In their provisions for damages they embody both punitive and compensatory damages *but no recovery can be had unless a case for compensatory damages is made.* * * *"

The Special Master, the District Court, and the Court of Appeals have held that no such case has been made on the facts found.

Petitioner cannot avoid the necessity of establishing a case for compensatory damages by an appeal for judicial enlargement of the statutory remedy as an aid in the enforcement of the anti-trust laws. A similar appeal was rejected by this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750.

2. The Contention That the License Agreements Were Inherently Illegal.

Petitioner's contention that the license agreements here involved were illegal is founded primarily upon the claim

that they were so adjudged by the District Court and by this Court in the *Toledo* case. The Court of Appeals in in this case held that no issue as to the *inherent* illegality of the license agreements was involved or decided in the *Toledo* case; that the provisions of such agreements did not render them inherently illegal; and that under the decisions of this Court only *inherent* illegality renders agreements unenforceable (Pet. Br., pp. 45-47). Since this holding destroyed the premise which petitioner had conceded was indispensable to its contention that its payments were illegally exacted (*supra*, p. 3), that Court was not required to, and did not, decide whether payments made, even under unenforceable agreements, for benefits received and retained, can be recovered as damages under Sec. 15, Title 15 U. S. C.

An examination of the *Toledo* record, including the opinions of this Court in the light of the issues in that case, clearly sustains the conclusion of the Court of Appeals that no question of the inherent illegality of the individual license agreements was presented or decided. That case did not involve any question of the enforceability of such agreements. The Government was entitled to relief in that action if it established that the defendants or some of them were engaged in a conspiracy to violate the anti-trust laws, and was entitled to relief with respect to the Hartford licensing system if that system was found to have been used as a means of violating such laws without respect to the legality of the provisions of the individual agreements.

Whether the individual license provisions were inherently legal or illegal was immaterial. This is well illustrated by a consideration of *Wilder Mfg. Co.* v. *Corn Products Co.*, (1915) 236 U. S. 165 and *U. S.* v. *Corn Products Co.*, (D. C. S. D. N. Y. 1916) 234 Fed. 964, 979. In the

former case the issue was whether the plaintiff was entitled to recover for goods sold to the defendant. The defendant contended that plaintiff was engaged in an illegal conspiracy to violate the anti-trust laws; that certain restrictions in its contract were inserted as a means of carrying out the objectives of the conspiracy; and that the agreement was consequently illegal and unenforceable. This Court, distinguishing *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, relied on by petitioner here, held that the illegality claimed was collateral and not inherent and that collateral illegality was not a defense.

In the second case, which was a Government action for injunctive relief with respect to the same agreements, Judge Learned Hand said:

> "* * * That such a contract was not inherently illegal is undoubtedly the fact, for it was so expressly decided by the Supreme Court in the case of *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916 A. 118. But there is no warrant in the opinion for supposing that it was a permissible method of trade when a part of a general scheme of monopolization. That is the question which this case presents." (p. 979)

Similarly this Court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 401, holding invalid a system of patent licensing found to have been entered into for the purpose of organizing an industry and stabilizing prices, said:

> "* * * That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert. * * *"

The fact that the future inclusion of restrictive provisions in license agreements was enjoined in the *Toledo* case is likewise of no significance on the question of whether inherent illegality was an issue in that case. As this Court said in *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724:

> "* * * Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. * * *"

General language used in the *Toledo* conclusions of law must of course be read in the light of the issues there involved, but it is clear in any event that each reference of the District Court in that case to the legality of such agreements is with respect to the system as a whole under the conditions which were found to exist. In the course of his opinion, Judge Kloeb said:

> "* * * The court realizes that a license and lease system may be perfectly legal and just if properly used. However, in the instant case, there has been a deliberate abuse and misuse of that system; and the court believes that there will be further abuses in the future as long as there is a semblance of that system remaining. It is the opinion of the court that this entire system must be abolished" (46 F. Supp. 541, at 621).

At page 24 of its brief petitioner sets out various provisions of its license agreements. (A stipulated summary of the various license provisions appears in Finding 39 in the report of the Master, R. 540-49). The only such provisions of the general character referred to in the Toledo District Court findings and conclusions are those restricting the fields of permitted ware. But apart from the use

of such provisions in the licensing system as a whole for the purpose of controlling the industry as found in the *Toledo* case, such limitations on the use of leased machinery have never been condemned but have always been recognized as within the normal prerogative of a patentee. Cf. *General Talking Pictures* v. *Western Electric Co.*, 305 U. S. 124, 127; *Hazeltine Research* v. *Automtaic Radio Mfg. Co.*, 77 F. Supp. 493, 497 (D. C. Mass. 1948).

The inclusion of such otherwise lawful provisions even for the purpose of furthering unlawful control of the industry, no more rendered the agreements inherently illegal than did the inclusion of the provisions complained of in *Wilder Manufacturing Company* v. *Corn Products Co.*, 236 U. S. 165. In *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, this Court said:

> "* * * If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. *It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears.* The Court does not give its approval to transactions betweeen one of the litigants and a third party just because it holds them irrelevant in this litigation" (p. 756).

The foregoing considerations would have been squarely applicable to an action brought by Hartford to collect license

fees and royalties from petitioner. Hartford could have established its claim by introducing in evidence its contracts, and proving that petitioner had in fact received the leased machinery (as to license fees), and had produced the quantities of ware claimed (as to production royalties). Illegality on account of the use of the licensing system could only have been established by going outside of the dealings between Hartford and petitioner and proving Hartford's relations and agreements with third persons. Illegality so required to be established is of necessity collateral.

The contention that inherent illegality of petitioner's license agreements was decided by this Court in the *Toledo* case is unfounded. Other authorities cited by petitioner obviously have no bearing on that issue. The decision of the Court of Appeals that petitioner's license agreements were not inherently illegal is not in conflict with any applicable decision of this Court but is in full accord therewith.

3. Collateral Illegality by Reason of Anti-Trust Law Violations Does Not Prevent the Enforcement of Contract Obligations.

That collateral illegality on account of anti-trust law violation is not a defense to an action to enforce contract liability is settled by the decisions of this Court culminating in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743. Earlier decisions were *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165; and *Small* v. *Lamborn*, 267 U. S. 248, 252.

Continental Wall Paper Co. v. *Voight*, 212 U. S. 227, relied on by petitioner, was distinguished in *Wilder Mfg.*

Co. v. *Corn Products Co., supra* and *Bruce's Juices* v. *American Can Co., supra* on grounds which make it clearly inapplicable here. The Court of Appeals very properly followed the holding of this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 755:

> "* * * This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute [Sherman Anti-Trust Act.] * * * But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit * * *."

Its decision with respect to the effect of collateral illegality is clearly not in conflict with but follows the applicable decisions of this Court.

4. Illegal Exaction Is Not a Basis for the Recovery of Damages for Anti-Trust Law Violations.

Since the Court of Appeals held that the license agreements were not inherently illegal and that Hartford could have enforced them against petitioner, it found it unnecessary to consider or decide the further question of whether payments made under an agreement inherently illegal under the anti-trust laws, for benefits received and retained, can be recovered as damages. Petitioner assumes that such a

result would follow a determination of inherent illegality but neither authority nor sound principle supports such an assumption.

Stripped of the verbiage with which it has been surrounded, petitioner's actual ground of complaint is that by paying what it agreed to pay for a consideration received and retained, it lost the opportunity to resist an action for collection thereof on the ground that its agreements with Hartford violated the anti-trust laws and thereby obtain a windfall at Hartford's expense.

Its complaint is not that it paid too much for what it received, but that it paid at all. There is no factual basis on which a contention could be made that Hartford's rates were excessive. Not only is there no such finding in this case, but there was none in the Toledo case. This Court there said:

> "* * * It is to be borne in mind that the Government has not, in this litigation, * * * attacked, as excessive or unreasonable, the standard royalties heretofore exacted by Hartford * * *" (323 U. S. 386, 414).

It should also be noted that petitioner has no basis for any claim that it suffered damage by reason of the limitation of its fields of ware which it contends made its agreements illegal. It does not assert and the record would not support the assertion if made that it was ever denied the right to enter any field of ware which it was actually prepared or even desired to enter. Cf. *Triangle Conduit & Cable Co.* v. *National El. Prod. Corp.*, 152 F. (2d) 398 (3rd Cir. 1945).

Petitioner could claim that it was actually damaged to the extent of the payments made only by showing that,

except for its agreements with Hartford, it could have obtained the same benefits at no cost. Of course no such suggestion is made. Loss of the opportunity to assert illegality as a defense and the consequent loss of a windfall cannot constitute legal injury within the meaning of the anti-trust laws entitling petitioner to recover as damages treble the amount paid.

Where an agreement is inherently illegal, recovery is denied not because of any concern for the defendant or any recognition of merit in his position, but solely on account of the public interest because of which the courts decline to enforce such a contract at the behest of either party. *McMullen* v. *Hoffman,* 174 U. S. 639, 669; *Continental Wall Paper* v. *Voight,* 212 U. S. 227, 262; *Twin City Pipe Line Co.* v. *Harding Glass Co.,* 283 U. S. 353. The underlying basis of the holding in *Morton Salt Co.* v. *Suppiger,* 314 U. S. 488, is likewise the protection of public interest by denial of the aid of the court in vindication of private rights where the public might be adversely affected.

Private individuals frequently become the incidental beneficiaries of the foregoing principles of public policy, but they have no property right in their application of which they are deprived by voluntary payment. Thus, as stated in *12 Am. Jur.* at page 725, "the general rule is that neither party to an [illegal] agreement that has been executed on both sides will be aided in recovering what he has parted with under the agreement."

The claim of illegal exaction is wholly irrelevant to the issue of injury to property or business for which alone damages can be awarded under the anti-trust laws, and has been uniformly denied as a basis for such recovery. In *Clark Oil Co.* v. *Phillips Petroleum Co.,* 148 F. (2d) 580 (8th

Cir. 1945) cert. den. 326 U. S. 734, a gasoline dealer sought to recover from an oil company, found in a previous case to have been engaged in a conspiracy violative of the anti-trust laws to increase the price of gasoline, for the amount of the increase in the wholesale price, without proving any loss sustained because of such increase, on the theory that the amount paid constituted an illegal exaction. The Court said:

> "Plaintiffs are seeking, not compensation for damages suffered by defendants' illegal acts, but profits because of said acts. * * *
>
> "* * * Right of recovery under the Clayton Act, however, is dependent upon pecuniary loss or damage. In the excess freight rate cases plaintiff may recover the excess over the tariff rate, *not as damages* but as *overcharges*. * * *
>
> "* * * As the action to recover treble damages is not for the amount of the overcharge exacted, the 'illegal exaction theory' of the freight rate cases is not applicable. (pp. 582-3)"

Accord: *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. (2d) 967 (7th Cir. 1943).

As previously pointed out, the result of a recovery here would likewise be not to compensate petitioner for damages sustained from violation of the anti-trust laws, but to confer on it a profit by reason of such violation. This is particularly true where, as the Court of Appeals noted, the *Toledo* case found that "the Hartford royalties have been passed on to the ultimate consumer" (Pet. Br. p. 43). There is no finding to the contrary here. *Cf. Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2) 747, 751 (8th Cir.) cert. den. 314 U. S. 644.

The right to recover as damages amounts paid for license fees or royalties under license agreements held to violate the anti-trust laws has been denied in the only other reported case in which it has been presented. In *Alden-Rochelle, Inc. et al.* v. *American Soc. of Composers, Authors and Publishers,* (S. D. N. Y. 1948), 80 F. Supp. 888, certain motion picture exhibitors sought to recover, as damages sustained from violation of the anti-trust laws, all license fees paid to Ascap for the right to exhibit sound films containing musical compositions of its members, asserting that since the licenses were illegal Ascap was not entitled to collect license fees thereunder. The entire licensing practices of Ascap were held to violate the anti-trust laws and enjoined on the ground that the various owners of copyrights could not lawfully combine their copyrights, but recovery of the license fees was denied.

In rejecting the claim, Judge Leibell said:

> "* * * Plaintiffs can not recover unless they were led to pay 'more than the worth' of the performing rights. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241. They must show that they were injured. Twin Ports Oil Co. v. Pure Oil Co., 8 Cir., 119 F. 2d 747; Northwestern Oil Co. v. Socony Vacuum Co., 7 Cir., 138 F. 2d 967.
>
> "To apply the principle of forfeiture plus a 200% penalty, for which plaintiffs in effect contend, would be to go far beyond any sanctions the Supreme Court has approved in a private right of action for a violation of the anti-trust laws. * * *
>
> "* * * The fact that the thing sold is something intangible, a right instead of merchandise, does not alter the requirement of the anti-trust laws that the plaintiff must show that he has been injured. The

> burden of proof is on plaintiff to show that part of his case by a fair preponderence of the evidence. * * * *A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator*" (pp. 897-8).

None of the cases cited by petitioner involves a claim for treble damages based on illegal exaction. *Continental Wall Paper Co.* v. *Voight & Sons, supra,* involved a claim of illegality, because of anti-trust law violation, as a defense to an action to collect the purchase price of goods sold. In that case, as stated by this Court in *Wilder Mfg. Co.* v. *Corn Products Co., supra,* and *Bruce's Juices* v. *American Can Co., supra,* the contract sued on had as its object and effect accomplishment of illegal ends which the Court found would have been consummated by the judgment sought. Both plaintiff and defendant were parties to the illegal combination and under the principle there applied neither would have been permitted to invoke the aid of a court. This Court said:

> "* * * the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law" (212 U. S. 262).

Obviously there is nothing in the foregoing to suggest that if the defendant had voluntarily paid, it could have recovered the amount as damages for anti-trust law violation or otherwise. The principles upon which the decision is rested clearly negative such a possibility. Petitioner does not contend that it was a participant in the unlawful conspiracy but that is an essential element of the *Wall Paper* case. Establishment of such a claim would of itself bar recovery.

In *Morton Salt Co.* v. *Suppiger,* 314 U. S. 488, it was held that since the plaintiff was attempting to extend its patent monopoly beyond the scope of the patent, it was contrary to public policy for a court of equity to lend its aid against an infringer. But that doctrine, as recognized by Judge Leibell in *Alden-Rochelle Inc.* v. *Ascap,* 80 F. Supp. 888-897, lends no support to the right of a licensee to recover as damages, amounts paid as royalties and license fees under agreements claimed to be illegal because of anti-trust law violation.

Certainly there is nothing in *Bruce's Juices* v. *American Can Company,* 330 U. S. 743, which supports the right to recover royalty and license fee payments as damages. This Court did, of course, recognize Bruce's right to maintain an action for damages for violation by the seller of the Robinson-Patman Act. But obviously the damages recoverable in such a case would not have been the agreed purchase price of the cans which he was held obligated to pay, but the damages for injury to his business and property suffered in that and other transactions by reason of the violation of the statute. Clearly, there is no implication that the collection of the agreed purchase price would itself constitute a violation of the anti-trust laws for which the seller

could be required to repay the amount collected, trebled. Petitioner in this case had a right to recover any damages it could show to have been sustained as a result of respondents' anti-trust law violation. Its difficulty is that it has been unable to make such a showing, as conclusively found by the District Court. The following language of this Court in the foregoing opinion is directly applicable to petitioner's claim here:

> *"It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer obtained from the seller.* The seller would lose the amount carried in notes or in open account. *Had Bruce's delinquency been greater, so would its gain;* had there been no credit asked or given the buyer could have had no remedy by way of defense. The obvious consequence would be to discourage vendors from extending credit where the operation of this rather difficult statute is in doubt. * * *
>
> *"This construction which would make a grant of credit a point of vulnerability could be avoided only by holding that the whole purchase price, not merely that involved in the credit, is uncollectible and recoverable even if voluntarily paid. In that case, the volume of the transaction, rather than the volume of the credit extended, would measure the loss a seller might suffer from violating the Act.*

> *"But, of course, if the discount system of the Can Company makes all of the Bruce purchases illegal and the price thereof recoverable, all sales to others under the discount system must be similarly tainted. It is hard to see how any of the Can Company's sales are valid if these to Bruce are void on the theory advanced. If this view is taken, certainly the remedy would soon end illegal quantity business discounts—by ending the business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. It must not be forgotten that such a decision would have retroactive effect for several years and unsettle many accounts. We cannot justify a judicial declaration to this effect"* (pp. 753, 754).

The measure of recovery sought here is equally unrelated to the extent of any injury suffered, but is measured solely by the amount paid regardless of the benefits received and retained, which would include not only the use of the machines but the service which the District Court held resulted in turning an unprofitable operation into substantial earnings, and with reference to which this Court said:

> "* * * Under this system Hartford rendered a service in the repair, maintenance and protection of the machines, which is valuable, if not essential, to the users * * *" (323 U. S. 409).

Chattanooga Foundry, etc. v. *Atlanta,* 203 U. S. 390 also cited by petitioner, did not involve a claim of illegal exaction. Recovery was sought and obtained for the difference between the price paid and the price which the buyer would have been required to pay except for the unlawful conspiracy.

Petitioner also seeks to support the recovery of license fees and royalties by a quotation of language appearing in the separate opinion of Justice Rutledge in the *Toledo* case. That case presented two questions with respect to royalties, (a) whether the *Toledo* decree requiring royalty-free licensing for the future should be sustained and (b) what disposition should be made of the royalties paid after the entry of the judgment of the District Court which had been required to be impounded by the receiver pending the final action of the Court.

While Justice Rutledge concurred in the opinion of the majority with respect to sustaining Judge Kloeb's findings of anti-trust law violation, he dissented from the majority as to the relief to be granted, including that as to royalty-free licenses and the disposition of the impounded royalties, and the quoted statement is a part of that dissent. But in any event no question was then before this Court, either as to the right to retain royalties previously paid, or as to the right to recover amounts so paid threefold as damages sustained by reason of anti-trust law violation.

The language of Justice Rutledge is repeated by Justice Douglas in a dissenting opinion in *U. S.* v. *National Lead Co.*, 332 U. S. 319, 367, but the only question involved there was that of future royalty-free licensing.

Regardless of the inherent legality or illegality of the licensing agreements, there is no basis in authority or principle for the contention that petitioner has made a case for the recovery of damages under the anti-trust laws by merely showing that it paid royalties and license fees pursuant thereto.

5. The Hartford-Owens Agreement.

One further contention is made by petitioner with respect to its right to recover license fees and royalties, which appears to be that its position is strengthened, in some undefined respect, because under the Hartford-Owens agreement of 1924, the payments made to Owens were measured by the payments of Hartford's licensees.

Under the terms of that agreement, Owens granted Hartford an exclusive license under its gob-feeding patents and patent applications which it then owned or might acquire prior to July 1, 1931. In return it obtained a non-exclusive license under all of Hartford's gob-feeding patents, the right to use 40 Hartford feeders and formers free of royalty up to $440,000 annually, and the right to one-half of Hartford's income from licensed inventions in excess of $600,000 per year. It is stipulated here that the result of this agreement was to enable manufacturers, including plaintiff, to procure from a single source (Hartford) a license under the gob-feeding patents of both Hartford and Owens and to make all the gob-feeding inventions of both companies available to Hartford licensees (Ex. 507, R. 1018).

There was neither any contention nor any finding in the Toledo case and there is no evidence or finding in this case, that the rights acquired by Hartford for its licensees, including petitioner, without additional cost to them, by the 1924 agreement were not fully worth what Hartford agreed to pay Owens or that Hartford could have acquired such rights for its licensees on any other basis. The primary objections to the agreement in the *Toledo* case were that it eliminated competition between the suction and gob fields

and that by Section 22 Owens retained the power to veto future licenses. Neither of these results could damage petitioner because it was already a licensee of Hartford and any policy which would limit the granting of additional licenses to its competitors would in fact inure to its benefit.

Manifestly the mere fact that a part of Hartford's income from licensed inventions was paid to Owens under that agreement does not improve petitioner's claim to recover its royalty and license fee payments as damages. The amounts paid by it to Hartford for royalty and license fees were not increased as a result of the Owens contract. Whether the payments which Hartford agreed to make for the license under the Owens patents were measured by a proportion of Hartford's income from its own patents, supplemented by its rights as a licensee under the Owens patents which inured to the benefit of petitioner, or in some other manner, was obviously immaterial as far as petitioner was concerned. Certainly it cannot be contended that except for the Owens contract petitioner would have obtained Hartford machines and services royalty-free.

With reference to the claimed competitive advantage of Owens as a result of the agreement, it must be remembered that Owens could already manufacture glass containers royalty-free by use of its own suction process. It had that competitive advantage prior to the 1924 agreement and would have continued to have it if the agreement had never been entered into. It might also have been able, had the agreement never been entered into, to use its patents to block the use of all gob-feeding mechanism by Hartford licensees, including petitioner, and retain the business of manufacturing containers for its own benefit and that of its suction licensees. It is beyond human ingenuity to deter-

mine what conditions would have existed in the industry except for the 1924 agreement. Cf. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222.

But even if it be assumed that Owens did in fact obtain a competitive advantage, that alone does not establish injury to petitioner within the meaning of the anti-trust laws, in the absence of evidence that Owens made use of the advantage to divert business which petitioner would otherwise have obtained, or to force it to sell at lower prices than it would otherwise have received. Cf. *Interstate Com. Com.* v. *U. S.*, 289 U. S. 385; *Penn. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 202-206.

No inference can be drawn from the petitioner's earnings that it sustained any injury because of the Owens contract. Its operation had not been profitable prior to its becoming a Hartford licensee in 1923 and its profits not only were not diminished but increased from 1924 on, after the Hartford-Owens contract was entered into, until late in 1929 (*supra*, p. 4). There is no finding that by reason of the 1924 agreement or otherwise the conspiracy adjudicated at Toledo functioned in any way in the last three months of 1929 or in 1930, which would differentiate its effect during that period from the prior years when petitioner was making profits. Petitioner's losses following the 1929 market crash were found to be attributable to causes for which respondents had no responsibility and over which they had no control (M. Fdg. 36, 37, R. 498, 507; Ct. Fdgs. 33, 34, R. 626, 629).

But in any event petitioner's claim is not based on damage claimed to have been sustained because of the Owens agreement but because of the disposition by Hartford of the amounts paid under its license agreements. No such

question is in any degree relevant to petitioner's right to recover as damages the amounts so paid to Hartford.

B. The Court of Appeals Correctly Construed Section 5 of the Clayton Act.

The contention that the Toledo judgment in and of itself established presumptively the fact of injury to petitioner, and that such presumption became conclusive because respondents rested at the close of petitioner's evidence, has no support in authority or legal reasoning. The argument by which it is sought to be supported consists of quoting the statute (15 U. S. C. 16), referring to the general adjudication of anti-trust law violation in the Toledo judgment, stating that petitioner was engaged in the business of manufacturing glass containers during the time the conspiracy was in progress, and pointing out that respondents rested at the close of petitioner's case. Needless to state, no case is cited even remotely supporting the claim.

Viewed in the light of the actual holdings in the *Toledo* case, the argument is even more extreme. As will be shown, in that case the Government pleaded and attempted to prove that the receivership and sale of petitioner's properties were steps in the conspiracy. The decision was against the Government. Now petitioner seeks to prove a fact by use of the judgment in a case where the decision was that the fact did not exist.

The argument assumes, without discussion, that by virtue of the statute, a Government judgment dispenses with the necessity of a plaintiff establishing causal connection between the violation and the damage and casts upon a defendant the burden of disproving such connection. That the burden is on a plaintiff to prove such causal con-

nection, see authorities cited in the Court of Appeals opinion (Pet. Br., p. 43). If petitioner's contention is correct, it means that a plaintiff can introduce a Government judgment in evidence, prove that he was engaged in the business with respect to which the judgment was entered at the time of the violation found, and rest his case. If no further evidence is introduced, judgment for the plaintiff must follow. How the amount of such a judgment could be computed is not suggested.

Applied to this case, the contention goes even further. Even though plaintiff introduces other evidence which has been found to show a lack of damage, judgment still must follow as a matter of law on petitioner's theory if the defendant rests without introducing evidence and a reviewing court must so find even in the absence from the record of the evidence actually introduced at the trial and in spite of findings below to the contrary.

Obviously the statute contains no language suggesting such a result. It merely provides that such a judgment is prima facie evidence in a suit between private litigants as to the matters respecting which the judgment or decree would constitute an estoppel in favor of the Government in the first case. The *Toledo* judgment is evidence in this case only by reason of and to the extent provided by the statute, but for which it would be inadmissible for any purpose. *Buckeye Power Co.* v. *duPont deNemours & Co.*, 248 U. S. 55, 63.

Any fact which under the ordinary principles of estoppel by judgment would be deemed established in favor of the Government in a second action between the Government and respondents would be prima facie established in this case but the estoppel could extend only to the issues actually and

necessarily litigated and determined in the original case, since a different right of recovery is involved. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. Obviously the right of private individuals to recover damages is not an issue in a Government case.

It should be noted that petitioner does not attempt to point out any specific injury to it claimed to have been adjudicated in the *Toledo* case, but refers only to the adjudication of anti-trust law violation. That case did involve issues as to the responsibility of respondents for the failure of petitioner, but all were decided against the Government.

The complaint in the *Toledo* case contained allegations as to the Turner receivership and subsequent sale of its properties to General Glass (Toledo Printed Record 48-49) and these were claimed to have been in pursuance of the conspiracy (Toledo Record 86, 124). Anchor Hocking, the successor of Hocking, which had acquired first a half interest and then the entire interest in petitioner's property through General Glass, and Collins, Williams and Fulton, former directors of petitioner and directors of Anchor Hocking, were named as defendants. The evidence submitted by the Government encompassed substantially all the claims of injury to Turner stated in its complaint here. Hartley, Turner's president, testified for the Government.

At the close of the case, the Government tendered extensive findings, which if entered would have linked Turner's affairs and Anchor Hocking, Collins, et al., with the conspiracy. These were rejected by the trial court as to all defendants (Requested Findings 527-536, R. 564-6, Toledo Record, pp. 7038-40). The court also dismissed Anchor Hocking and Williams, but did hold Collins and Fulton as defendants.

In this Court, the Government sought to uphold the judgment against Collins and Fulton largely on the evidence as to their relations with Turner, urging the connection of the matters covered in the tendered findings with the conspiracy.

This Court unanimously reversed as to Collins and Fulton because of the refusal of findings requested by the Government and because of the failure of proof (See excerpts from this Court's opinion, *supra*, p. 9).

This clearly demonstrates the absurdity of the contention that the introduction of the *Toledo* judgment in this case presumptively established damage to petitioner.

The Court of Appeals properly construed the statute in holding that the introduction of the *Toledo* judgment was of no avail to petitioner unless it established that it sustained damage, and constituted no basis for disturbing the finding of the District Court to the contrary. The mere fact that petitioner asserts a construction of the statute, contrary to its plain language and to fundamental principles, which has not heretofore been considered worthy of assertion by any other litigant, does not create a necessity for its settlement by this Court.

C. The Contention That the Evidence Establishes Pecuniary Loss to Petitioner.

Petitioner's third contention, as stated under "Questions Presented" (p. 7-8) and "Assignment of Errors" (p. 21) appears to be a repetition of the claim of damage based on payment of royalties and the claim that the *Toledo* judgment established the fact of damage, combined with the loss of its properties through receivership and sale.

Since petitioner's argument of the contention (Br., p. 32-35) is limited to the effect of the loss of properties and since the royalty and *Toledo* judgment points have already been discussed, consideration will be given here only to the receivership and sale.

This contention was not even made in the Court of Appeals (see Amended Statement of Points, R. 2145), and could not have been considered if made, in view of the findings below and the absence of substantially all of the evidence on which such findings were based (*supra*, pp. 2-3).

The Master and the District Court concurrently found:

> "The corporate defendants while engaged in a violation of the United States anti-trust laws did not conspire to bring about Turner's failure or the appointment of said receiver for Turner * * *" (M. Fdg. 37, R. 533: Ct. Fdg. 34, R. 651).
>
> "No one or more of the corporate defendants while engaged in violating the United States anti-trust laws conspired to bring about, or caused, said receiver's sale to General Glass or caused this court to confirm said Receiver's sale (M. Fdg. 38, R. 539; Ct. Fdg. 35, R. 655).
>
> "The evidence herein does not establish that * * * anything done by any one or more of the seven corporate defendants in the instant case, while, engaged in violating the United States Anti-Trust laws, caused Turner's failure or the Turner receivership or brought about the Receiver's sale to General Glass or caused any other injury to Turner's business or property" (M. Fdg. 43, R. 567; Ct. Fdg. 39, R. 663).

These ultimate findings were supported by detailed evidentiary findings.

Petitioner does not even refer to any of these findings, and suggests no ground on which they can be disregarded here.

Even if they could be questioned in this Court, and the isolated matters referred to in the brief considered without reference to the omitted evidence, there would be no merit in the contention.

The assertion that petitioner was known as a price cutter (unsupported by the record) does not prove damage. The letter quoted at page 33 of petitioner's brief and Finding 605 from the *Toledo* case show only discussions of a possible merger of Turner and Thatcher, which was abandoned. The letter was an exhibit in the *Toledo* case (Ex. 846, folio 60141, not printed) and neither it nor Finding 605 resulted in a holding there that the Turner liquidation was connected with the conspiracy. On all the evidence below the Master made no finding in accord with Finding 605, although he did make detailed findings as to the Thatcher-Turner negotiations at the time (M. Fdg. 35, R. 495-6) as well as the receivership and sale (M. Fdgs. 37, 38, R. 507-539).

The facts that a receiver was appointed for petitioner at the suit of Hartford and its property sold to General Glass do not prove recoverable damage to petitioner. The claim that the receivership was an overt act rests only on petitioner's assertion contrary to the findings. *Columbia Gas & Electric Corp.* v. *U. S.*, 151 F. (2d) 461, has no bearing on the matter. It involved the status in a bankruptcy reorganization of claims of a stockholder and creditor who had wrongfully brought about the failure at a time when the bankrupt might have survived. Even if the holding was applicable to a damage suit, which it is not, it could not apply to the facts found in this case.

No question is presented for the consideration of this Court by the contention that petitioner sustained recoverable damage on account of the receivership and sale of its

property, considered either separately or in conjunction with other asserted claims.

D. The Contention That the Master Improperly Considered and Relied Upon Matters Outside of the Record.

Petitioner's last contention is that the Master improperly considered and relied on the rejection by the Toledo court of certain findings tendered by the Government in that case, which if accepted would have connected injury to petitioner with the conspiracy there adjudged. Complaint is made that these rejected findings were not introduced in evidence in this case.

Petitioner seems to assert at some places (Pet. p. 11, Br. p. 22) that the rejection of these findings was relied on in support of the Master's general finding that petitioner was not harmed by any act of respondents (M. Fdg. 43, R. 567). There is nothing in the record to so indicate. These rejected findings are set forth in Finding 40, relating entirely to the *Toledo* case and are prefaced only by the statement that they were not entered by the Toledo court (R. 564).

In any event, it was clearly a matter for the District Court in reviewing the Master's report to determine whether any improper consideration had been given to the rejected findings. The District Court, having before it all of the evidence presented to the Master, confirmed the result reached, but did not include in his own findings any reference to the rejected findings. What this Court is in effect asked to do, without such evidence before it, is to review the District Court's determination that no improper consideration had been given to such findings. There is nothing in the record to show what, if any, consideration the District Court gave to the rejection of the findings or to

this Court's statement as to their effect in reversing as to Collins and Fulton. The presumption is, of course, that no improper effect was given.

In the argument (Br., p. 35), it is asserted only that the Master improperly relied on the rejected findings in support of his conclusion that the Toledo court did not adjudge that respondents caused any injury to petitioner.

It was not only proper but necessary to examine the rejected findings in order to understand fully the reference of this Court to such findings in reversing as to Collins et al. (*supra*, p. 9). For this purpose it was immaterial whether they were offered in evidence. The record in another case may be looked to, to determine the holding in that case. *Oklahoma* v. *Texas*, 256 U. S. 70, 93; *Metropolitan Casualty Co.* v. *Stevens*, 312 U. S. 563, 566, footnote 3; *U. S.* v. *Flannery*, 268 U. S. 98, 103-4; *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F. (2d) 218, 219 (2nd Cir. 1924).

No conclusion other than that reached by the Master as to whether the Toledo judgment adjudicated any injury to petitioner was possible in any event, regardless of any consideration of the rejected findings.

The petition is without merit and should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. 92.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' CONTENTIONS.

Respondents' brief in opposition to the petition for writ of certiorari asserts that:

1. No issue of the right to recover the license fees and royalties illegally charged by respondents has been asserted.

2. Notwithstanding

(a) the payment by petitioner of royalties and license fees to respondents that were "the immediate

product of the conspiracy" (Hartford Empire v. U. S., 324 U. S. 386; U. S. v. National Lead Co., 332 U. S. 319; and

(b) a receivership of petitioner upon the complaint of Hartford for unpaid royalties,

petitioner has no right to recover under the anti-trust laws because of its weakened financial condition and asserted destruction by the depression.

3. The license agreements, admittedly illegal in furtherance of the conspiracy and admittedly "for the purpose of controlling the industry" (Res. Br., p. 16) were nevertheless not inherently illegal; were not adjudged to be illegal by this court in Hartford Empire v. U. S., 323 U. S. 386, 324 U. S. 570; and petitioner therefore has no right to recover such illegal payments of license fees and royalties as damages under the anti-trust laws.

4. Recovery by petitioner would penalize respondents and would permit others so injured to recover also.

5. Reliance upon proposed findings not adopted by the Toledo Court where petitioner was not a party and not offered or admitted in evidence in this cause was proper. That "it was not only proper but necessary to examine the rejected findings" (Res. Br., p. 38) and that "it was immaterial whether they were offered in evidence."

RIGHT TO RECOVER ROYALTIES AND LICENSE FEES IN ISSUE.

Respondents' first assertion, that the right of petitioner to recover royalties and license fees illegally procured is not an issue in this case, is patently untrue.

Petitioner's amended and supplemental complaint alleges (a) the restrictive licensing of Hartford and Owens has

been beyond the scope of the patent laws and in violation of the anti-trust laws (Comp. paras. 60-70, incl.; R. 43-48), and (b) the license fees and royalties paid by petitioner to Hartford during the period of the conspiracy, combination and monopoly, placed petitioner at a competitive disadvantage which directly caused injury and damage to petitioner's business and property (Comp. paras. 80A, R. 62).

The amount of the royalties and license fees paid by petitioner was stipulated and found by the Special Master (R. 1033-1036). The right to such recovery has been asserted by petitioner and contested by respondents at every step in this law suit and is squarely presented in the petition for the writ of certiorari.

PETITIONER'S RIGHT TO LIVE.

With respect to the second contention that petitioner was destroyed by the depression, respondents are compelled to maintain this position:

(a) Although it is established that respondents, except Stevenson, have violated the anti-trust laws and engaged in an unlawful conspiracy, combination and monopoly to dominate and control the glass container manufacturing industry or drive out of such business trouble makers or price cutters of which petitioner was one (46 F. Supp. 541, 587);

(b) respondents have built "one of the tightest monopolies in American history" largely to retain their illegal gains and continue their hold on the economy (Justice Douglas in Standard Oil Co. v. U. S., 17 L. W. 4510, 4517);

(c) respondents drained petitioner of its funds through the payment of royalties and license fees un-

der illegal license lease agreements, to which payments they had no right under the patent laws or others and which have been adjudged "the immediate product of the conspiracy";

(d) the license fees and royalties paid to Hartford were secretly shared with petitioner's competitor, Owens, for the adjudged and admitted purpose of giving a competitive edge to Owens;

(e) petitioner was put into receivership by respondent, Hartford, for unpaid royalties; and

(f) its assets and business purchased by a company formed by respondents Hartford and Thatcher (Toledo finding 600, R. 823);

yet the respondents come before this Court and proclaim that petitioner has suffered no legal damage since it was allegedly destroyed by the depresssion "commencing with the stock market crash in October 1929" (Res. Br. p. 5).

Respondents stoutly maintain petitioner was destroyed by the depression and further assert (Res. Br. p. 5) that "the entire glass container industry, however, was adversely affected by the severe business depression which became apparent during the summer of that year (1929)". This assertion is unsupported by any evidence or any inference from any evidence in this record or the Toledo record which was before this Court in Hartford Empire v. United States, 323 U. S. 386. Some adverse affects were felt during 1932, but respondents had disposed of petitioner in 1930.

As previously pointed out (Pet. Br., p. 15) petitioner's two glass container manufacturing plants were sold by the receiver appointed on complaint of Hartford on April 3, 1931 to General Glass Corporation, a corporation formed by

Hartford and Thatcher (Toledo Finding 600, R. 823), for $6,000, subject to the lien of a mortgage and the assumption of unpaid taxes in the amount of $24,950. Only the Winchester plant was operated by General. The Terre Haute plant was subsequently dismantled. Despite the one plant operation General had net sales of glass containers from April 1, 1931 to December 31, 1931 of $1,051,770.35 and for the year of 1932 of $3,055,938.18. The land, buildings, machinery and equipment of the one plant was carried on the 1931 balance sheet of General at $1,810,680.43 (Toledo Rec. 8042A).

Strange indeed it is that in 1929 Owens', despite respondents' asserted depression, total sales reached $37,322,828, an increase over 1928 of some $15,000,000. In 1931 Owens' total sales were $34,784,230 (Toledo Record p. 7930A). In 1929 Owens' total production by gross of glass containers was 10,906,707 while in 1931 it produced 9,923,452 gross (Toledo Rec. p. 7930C). In 1929 Owens received in total royalties $2,410,972.33, in 1930 it received $2,306,843.24, and in 1931, $2,259,414.86 (Toledo Rec. p. 7930G).

The Hazel Atlas consolidated balance sheets for the years 1929, 1930, 1931 (Toledo Rec. 7938, 7939, 7940 and 7941) show no disastrous depression results such as respondents picture.

Ball Bros. Company, with its chief plants at Muncie, Indiana, and within a few miles of petitioner's Winchester, Indiana plant, showed net profits after taxes as follows: 1929—$916,180.86; 1930—$1,367,819.48 and 1931—$4,423,334.77 (Toledo Rec. p. 8066).

Corning in 1929 had operating net income of 34% of net sales, the highest of any year since 1923. In 1930 it enjoyed 19.8% as against a 16 year average of 21% (R. 691-692). In 1929 Hartford secretly paid Owens $497,000; in

1930 Hartford paid $463,000. These enormous sums were only one-half of Hartford's net income after deducting $600,000. Thus, if Hartford was honest in its secret payments to Owens, Hartford had an income in 1929 and 1930 of more than $1,500,000. These payments were in excess of any prior year since 1924. Such income for a company whose assets were largely intangibles such as patents hardly reflects the severe effects of the depression in the glass container industry which respondents attempt to picture. Respondents, when challenged to do so, which challenge is reiterated here, could show no manufacturer in the glass container industry which was destroyed by the depression. Moreover, public documents refute the contention of an adverse effect on the entire industry in 1929 or 1930. See: TNEC Rep., part 2, pages 806-807. Respondents contend that petitioner however was the one exception.

The contention of financial distress of one victimized by a conspiracy was made in Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 75 L. Ed. 544, and was rejected by this Court in reversing the Court of Appeals (37 Fed. 2d 537). The dissenting opinion of the Court of Appeals confirmed by this Court points up the legal proposition (37 Fed. 2d 537, 544):

> "The conclusion is (to repeat) that, without the defendant's conspiracy to put the plaintiff out of business, it would have died anyway. The logic is, in that regard, hardly distinguishable from setting up the mortality of one as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or to its results" (see: 43 Harv. L. R. 1163).

So here, it is mere speculation to assert now that petitioner would have died had Hartford not come forward with the coup de grace, especially if the facts of the conspiracy had been known.

Similarly, in Bigelow v. R. K. O. Radio Pictures (from the same circuit as this case) 327 U. S. 251; 90 L. Ed. 1040, this court held in reversing the Court of Appeals that the plaintiff was entitled to conduct and continue his business free of restraints. See also: Columbia Gas and Electric Co. v. U. S., 151 Fed. 2d 461 (certiorari denied, 329 U. S. 737).

The legal principle involved is basic that respondents who act tortuously for the purpose of causing harm to petitioner's pecuniary interests are liable for the results, even though the harm results from an outside source, if the risk of such harm is increased by respondents' acts (Sec. 870, Restatement of Torts on Intended Harms).

The payment by petitioner to Hartford of royalties and license fees in excess of $1,000,000 shared in secretly by petitioner's competitor Owens, during the period of the illegal conspiracy, combination and monopoly, drained petitioner of its working capital and weakened it financially. Such tribute from petitioner, secretly shared by Owens to effect a competitive edge, as adjudged, at least increased the risk of harm to petitioner.

Each payment of license fees and royalties and each secret split by Hartford with petitioner's competitor Owens, all culminating in the subsequent receivership action brought by Hartford for unpaid royalties, was an overt act of the conspiracy which directly injured and damaged petitioner in its business and property, the right to recovery for which is given and measured by the antitrust laws.

ILLEGALITY OF LICENSE AGREEMENTS AND PETITIONER'S RIGHT TO RECOVERY.

Respondents contend that petitioner has no right to recover the royalties and license fees and the Hartford licenses at most were only collaterally illegal.

The findings of fact and conclusions of law in the Toledo case confirmed by this court afford the answer to the contrary of respondents' contention (Findings 471-473, R. 793; Findings 450, 451, 452, 456, 466, 467, 469, R. 789-792; Conclusions of Law 31-34, R. 840-841; 82-84, R. 852-853).

This court has stated in U. S. v. National Lead Co., 332 U. S. 319, at page 360:

> "In that case (referring to Hartford Empire v. U. S.) the court was dealing with a licensor organization which had no use for patents except for the resulting control over licensing . . ."

The Hartford licenses illegally restricting the manufacture and sale of unpatented glass containers wholly beyond any lawful patent monopoly, were the very core of the conspiracy, combination and monopoly, and were intended to be so by respondents.

They were in no sense collateral to the illegal conspiracy and this court has never considered them so.

The respondents have stipulated in this case that:

> "At all relevant times, all licenses granted by Hartford-Empire were restricted to certain types or kinds of glassware, and such licensees were specifically excluded from using feeders so licensed for other types and kinds of glassware. Such provision did not apply to certain machinery other than feeders licensed by Hartford-Empire" (Para. XLI, Rec. p. 1033).

It was also stipulated that:

> "Certain of Hartford-Empire license agreements relating to lehrs formerly included a provision limiting the use of licensed lehrs to use in connection with other Hartford-Empire machines, to wit: feeders. These restrictions were not included in Hartford lehr contracts issued subsequent to 1936, but all such provisions were not removed until 1939" (Para. XL, Rec. p. 1032).

Both the restrictions and the tying clauses were held illegal by the Toledo Court and this court. 46 F. Supp. 541; 323 U. S. 386; 324 U. S. 570 (Final Judgment Para. 19A, R. 886-889).

Respondents say that to permit petitioner to recover would "confer on it a profit by reason of such violation. This is particularly true where, as the Court of Appeals noted, the Toledo case found that 'The Hartford royalties have been passed on to the ultimate consumer' . . . There is no finding to the contrary here".

The finding of the Toledo Court to which respondents refer, relative to royalties being passed on, did not include this petitioner; it was not a party at Toledo. The special master in this case did not find that petitioner passed the royalties and license fees on to ultimate consumers, he found no more than did the Toledo Court. His failure to so find is a finding against respondents on the issue.

There is no evidence in this record that petitioner passed on the royalties and license fees or was able to do so and it is contrary to the established facts.

Respondents wholly overlook the fact that Hartford obtained the royalties and license fees by illegal conduct; they overlook the fact that Owens received approximately

one-half of all petitioner paid and $440,000 per year of free machinery: Owens a competitor of petitioner. Owens reaped a profit of millions much of which came from its competitors without their knowledge or consent.

That petitioner paid royalties and license fees to Hartford in the amount of $1,023,828.32, during the period of the conspiracy from 1924 to petitioner's receivership (R. 1033-1034), which were secretly split by Hartford with Owens is not only not disputed (R. 574, 704-705) but has been stipulated (R. 1029). Respondents do not deny the advantage to Hartford and Owens under their arrangement but seek only to justify and speculate as to such advantages (Res. Br. pages 28-31).

That Owens and Turner were competitors is established in this case (Finding No. 5, R. 574). The Toledo Court found (Finding No. 123, R. 704-705):

> "As a result of the 1924 agreement which gave Owens a share in Hartford royalties, a right to forty free feeders and formers, and an invention's license, Owens was placed and maintained in a dominant position over its competitors."

This finding is passed over lightly by respondents. The advantage was illegal and damaged petitioner in its business and property (46 Fed. Supp. 541, 561, 564, 568, 570; Conc. of Law, 6 and 55, R. 831 and 846).

The competitive disadvantage to which petitioner was put is aptly characterized by Justice Douglas, concurred in by Justices Murphy and Rutledge in U. S. v. National Lead Co., 332 U. S. 319, 368:

> "Each dollar of royalty adds a dollar to the costs of the new competitor and gives the established licensor another dollar with which to fight that competition."

In the instant case Owens took a share of every dollar paid by petitioner to Hartford, to effect this competitive edge. No rational basis can be found for contending that such a cost can be passed on and no basis for such a contention exists in fact on this record. Greater injury or damage to petitioner's business and property in an economic sense cannot be conceived.

Respondents in effect are saying that the restitution fixed by Congress is too high. Justices Rutledge and Black have answered this contention well. They say in a vigorous dissent:

> "The power, and much of the property, now aggregated in the combination's hands and those of its principal participant, was gathered by unlawful methods at the expense of the public and competitors. Presumably neither power nor property could have been accumulated by lawful means . . . (323 U. S. 442). But the pool has acquired more than 800 patents, which control the industry, of which Hartford alone holds more than 600 . . . Many of the patents, and certainly the cherished 'patent position', were secured only by virtue of the illegal conduct . . . **Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others**" (emphasis supplied) (323 U. S. 443) (Cf. Justices Douglas, Murphy and Rutledge dissent in U. S. v. National Lead Co., 332 U. S. 317, 364, at 367).

Petitioner contends that the rule thus stated by four Justices in the Hartford and National Lead cases, governs its right to recovery of the royalties and license fees in this action, and the refusal of the Court of Appeals to so

hold is in conflict therewith. The question is one that should be settled by this court under the anti-trust laws.

Respondents' arguments in opposition to petitioner's right to recovery of royalties and license fees, although obliquely stated, go in fact to the question of the amount of petitioner's damage—not the fact of damage. The distinction is clear and decisions of this court are pertinent. Bigelow v. R. K. O. Radio Pictures, 327 U. S. 251; Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555; Eastman Kodak v. Southern Photo Materials, 273 U. S. 359.

Furthermore, respondents introduced no evidence on quantum meruit. Despite the availability of many persons (R. 990 to 1003) who participated in the conspiracy, combination and monopoly, not one was called.

The assertion by respondents (Res. Br., page 19) that there was no determination in U. S. v. Hartford Empire that the Hartford royalties were excessive and unreasonable is untrue.

In the second opinion, Hartford Empire v. U. S., 324 U. S. 570, at 574, this court said:

> "The Government apprehends that the use of the word 'standard' with respect to the royalties to be charged by Hartford may be taken as a determination that **present royalties are reasonable. To avoid any misunderstanding** we substitute for the phrase 'standard royalties' the phrase 'uniform reasonable royalties.'" (Emphasis supplied.)

If respondents intend that the inference be drawn from the quotation (Res. Br., p. 19) that Hartford royalties, prior to the Toledo case, were reasonable and so considered by this court, then the quotation out of context is

wholly misleading. The "standard" royalties referred to were those forced by the Government action. This court stated, 323 U. S. 386, 408:

> "At the time of the District Court's decision, Hartford had reduced the royalties of all its licensees to its **then schedule of standard royalties.**" (Emphasis supplied.)

Clearly this court did not want it understood that Hartford royalties charged prior to the Toledo case were either standard or reasonable and thus clarified it by the second opinion.

Respondents' reliance upon **Northwestern Oil Co. v. Socony Vacuum Oil Co.**, 138 F. (2d) 967; **Clark Oil Co. v. Phillips Petroleum Co.**, 148 F. (2d) 580, and **Twin Ports Oil Co. v. Pure Oil Co.**, 119 F. (2d) 747 (Res. Br., p. 321) is unfounded. In each of these cases plaintiffs were jobbers who at all times were assured of a **fixed margin** between the cost and the sale price of gasoline. Although illegal increases were effected by defendants, the jobbers' margins **remained fixed.** In the **Northwestern** case the plaintiff jobber was found to be a party to the conspiracy. Thus, recovery in treble damages under the anti-trust laws was denied the jobbers. It cannot be contended that petitioner here was ever assured of any fixed margin, and on the contrary, was paying tribute to its competitor Owens through payments to Hartford which it shared with Owens.

Similarly, **Alden Rochelle Inc. v. American Society of Composers**, 79 F. Supp. 315, does not support respondents' view to defeat petitioner's recovery. In that case damages were denied on the ground that the rates were fixed by negotiations between all the exhibitors and ASCAP which were fair, reasonable and uniform and that the exhibitors paid for and received value as expected in performing rights licensed and further that there was no evidence

of overcharge. In the instant case the license fees and royalties have been adjudged excessive, unreasonable and discriminatory, and petitioner certainly cannot be found to have received what it paid for when its royalties and license fees were secretly shared by Hartford with Owens through conspiracy and combination.

Petitioner was given no opportunity to negotiate royalties or license fees it was required to pay Hartford, nor so far as petitioner knows was any other licensee except the favored few, who were the conspirators, ever permitted to negotiate license fees and royalties to be paid. The fees were fixed by Hartford probably after consultation with Owens and Corning.

RESPONDENTS' CLAIM OF PENALTY AND FORFEITURE.

Respondents rely upon the plea that petitioner's recovery in this action would constitute a forfeiture and confiscation of their property, and penalize them in a manner not provided by the anti-trust laws. Such contention is authoritatively answered by the Anti-trust Statute providing the treble damage remedy. Furthermore, the money was obtained illegally and is not the property of respondents.

As pointed out by this court (324 U. S. 570, 571), Hartford is entitled to compensation for the use of its machinery on a quantum meruit basis—a right petitioner has never denied. Thus, any contention by respondents of "free use of machinery" and subsequent penalty if petitioner is permitted recovery in this action is negatived and entirely without merit. The burden of showing such quantum meruit right rested with respondents and goes to the amount of damage, not the fact of damage. This

burden they declined to assume and rested at the close of petitioner's case.

This court in the Toledo case clearly stated the right of licensees to contest the payment of royalties under the illegal licenses and leases and to recover funds paid into the registry of the Toledo Court.

This court in Schine Chain Theatres, Inc., v. U. S., 334 U. S. 110, stated:

> "In this type of case we start from the premises that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless per chance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.
>
> "To require divestiture of theaters unlawfully acquired is not to add to the penalties that Congress has provided in the anti-trust laws. **Like restitution it merely deprives a defendant of the gains from his wrongful conduct.** It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the Government in their unlawful project * * *." (Emphasis supplied.)

PETITIONER'S PRIMA FACIE CASE AND REJECTED FINDINGS.

Respondents built one of the tightest monopolies known in American history through fraud and violations of the anti-trust laws of the grossest sort. Hazel Atlas v. Hartford Empire, 322 U. S. 238; Shawkee Mfg. Co. v. Hartford Empire, 322 U. S. 271. They now seek to oppose the granting of this Writ of Certiorari by using the decisions of this court, adjudging their guilt, as a shield to protect their empire and the spoils of their illegal practices.

Thus, they seek to thwart the intent and express provisions of Section 5 of the Clayton Act, which gives that final decree in this action the probative force of prima facie evidence against them. This they have no standing to do and this court's power of supervision and review is called for.

Moreover, as a sword, they use the device of "rejected findings"—tendered findings by Government counsel at Toledo not adopted by that court—to cut down and limit the scope and effect of the final decree in that case. Petitioner was not a party to the Toledo case. The rejected findings were never offered in evidence in this case and are no part of this record, a matter respondents deem immaterial to consideration by this court.

The dangers inhering in a rule authorizing reliance upon proposed findings not adopted by a court in another case and not in the record in the instant case, are too obvious to need exposition. Ohio Bell Telephone Co. v. The Public Utilities Commission, 301 U. S. 292.

Petitioner does not believe that the statements referring to "the rejection of findings" in the opinion of Justice

Roberts, 323 U. S. 386, 403, 405, were intended to afford these respondents, there adjudged guilty, the right to use such rejected findings in another action to limit in any way the scope and effect of the decision and judgment in the Toledo case. They have no standing to dilute the condemnation of their wrongs.

Decisions cited by respondents (Res. Br. p. 38) concerning res judicata questions, removal actions and cases where suits were filed in both State and Federal courts, are no authority for reliance upon rejected findings on the theory that they appear in the Toledo record as here asserted.

Proposed findings have been held to be not properly a part of a record. U. S. v. Forness, 125 F. (2d) 928. Assuming, however, that they were properly a part of the Toledo record, any consideration or reliance upon them in this case that would limit the scope of that adjudication particularly without admission in this record is improper and prejudicial error (See authorities, Pet. Br. p. 36).

Respondents have made numerous references in their Brief (pages 8, 33, 36) to the Toledo record as authority for their assertions. If their contention of the propriety of reference to the Toledo record and rejected findings is correct, the rule must cut both ways. This court then should consider such matters as the proposed conclusion of law, No. 7, submitted by respondent Thatcher to the Toledo Court (Toledo Record, p. 7119). Thatcher asked the Toledo Court to find that:

> "The Court finds that the acquisition of the Turner plants by General Glass Company and the participation therein by Thatcher Manufacturing Company, and the acquisition by Thatcher Manufacturing Company of an interest in said Turner plants, were legal and did not involve any restraint of trade."

Hartford requested the following conclusion of law; No. 22:

> "All the license agreements formerly in effect between Hartford and any non-defendant were lawful agreements. The intent of the parties entering into the agreement was lawful. The agreements did not in any way violate the Sherman Act" (Toledo Record, pp. 7209-7210).

Neither was adopted by the Toledo Court. If, as respondents contend, this "rejection" constitutes a determination of these issues which this court should consider as controlling, then this case must be reversed without more.

Respondents refuse to consider or attempt to refute or explain in any way whatsoever the actual finding of the Toledo Court relating to their designs upon petitioner (Finding No. 605, R. 824, Pet. Br. pp. 33-34).

CONCLUSION.

Respondents elected to rest at the close of petitioner's case. They refused to call the numerous witnesses available to them either to defeat the merits of petitioner's claim or to show any quantum meruit right to compensation in mitigation—a clear admission that such testimony would not support their answers and pleas or controvert petitioner's claims. Interstate Circuit v. U. S., 306 U. S. 208; Wahlgren v. Bauch and Lomb Optical Co., 68 Fed. (2d) 660, 663; Goldman Theatres v. Loew's, Inc., 150 Fed. (2d) 738.

Respondents' Brief in opposition to the issuance of this Writ makes amply clear the necessity of review by this court for a determination of questions of construction and

interpretation under the anti-trust laws and decisions of this court.

Denial of this petition will afford convincing support for the respondents' considered view (46 Fed. Supp. 541, 568), that their ill-gotten gains would not be lost by any enforcement of the anti-trust laws. A denial of this petition will permit to stand the statement of the Court of Appeals for the Seventh Circuit that "we are impelled to the conclusion that the licensing agreements were not inherently illegal". Petitioner believes the Supreme Court has decided otherwise.

Petitioner submits that a Writ of Certiorari should issue in this cause.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

TURNER GLASS CORPORATION,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION,
Respondents.

No. 92.

PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. 92.

PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

On June 1, 1949, Turner Glass Corporation filed its Petition for Writ of Certiorari, Brief in support thereof and Motion to dispense with the printing of the record in this cause. The petition presented four questions for review from the decision of the Court of Appeals for the Seventh Circuit.

On October 10, 1949, this Court granted Petitioner's motion to waive the rule requiring the printing of the record, but denied the Writ of Certiorari. Justice Black,

however, was of the opinion the writ should have been granted.

Petitioner now requests reconsideration by this Court of its petition for the issuance of a Writ of Certiorari on the single legal question of the illegality of the Hartford Empire license and lease agreements and the petitioner's correlative right to recover the license fees and royalties (stipulated as to amount) paid to respondent Hartford Empire pursuant to the illegal licenses issued by Hartford. The license fees and royalties so paid were shared by Hartford with respondent Owens, a competitor of petitioner, from 1924 until petitioner's receivership, all while respondent's conspiracy, combination and monopoly is adjudged to have been in full existence.

Petitioner's request for reconsideration is on two grounds:

First. The opinion of the Court of Appeals for the Seventh Circuit holding the Hartford license and lease agreements to be inherently legal is patently in conflict with the decision of this Court, the Findings of Fact, Conclusions of Law and judgment rendered in the case of **Hartford Empire v. United States**, 323 U. S. 386, 324 U. S. 570.

Second. Petitioner contends that the rule giving to petitioner the right to recover license fees and royalties is announced in the opinion of Justice Rutledge, concurred in by Justice Black in **Hartford Empire v. U. S.**, 323 U. S. 386, at page 443:

> "Every dollar hereafter, as well as heretofore secured from licenses on patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy."

All justices sitting (three justices took no part in the consideration of the case) concurred in the Hartford Empire case in holding that respondents here (except Stevenson Corporation) had violated the Anti-trust laws. The opinion of Justice Rutledge concurred in by Justice Black was a dissent only as to the modification of the decree.

The rule as above stated by Justices Rutledge and Black is quoted in **U. S. v. National Lead Co.**, 333 U. S. 319, at page 367, in the opinion written by Justice Douglas, with whom Justice Murphy and Justice Rutledge concurred. The dissent in the National Lead case also went only to the modification of the decree. Two justices took no part in the decision of this case.

Justice Jackson took no part in the consideration of either the **Hartford Empire** case or the **National Lead** case.

Thus, four of the eight justices who sat in these two cases have stated the rule in their opinions which petitioner contends is squarely applicable here.

In view of the decision of the Court of Appeals for the Seventh Circuit in the instant case, the law now stands that the Hartford Empire license and lease agreements were not inherently illegal. This is in square conflict with the decision of this Court in **Hartford Empire v. United States**, supra. The question of the right of a licensee under inherently illegal license and lease agreements is open unless within the rule of **Continental Wall Paper Co. v. Louis Voight & Sons**, 212 U. S. 227.

Because of the conflict of the Court of Appeals decision in this case with the decision of this Court in the **Hartford Empire** case, the announced statement of the rule applicable here and the substantial importance of the questions involved, petitioner respectfully requests the recon-

sideration of its petition for the issuance by this Court of a Writ of Certiorari on this single question.

Respectfully submitted,

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